Docket for 03-221

(10)

No. 03-221 Status: ARGUED
Title: Cheryl K. Pliler, Warden, Petitioner
v.
Richard Herman Ford
Docketed: August 12, 2003
Lower Ct: United States Court of Appeals for the Ninth Circuit
Case Nos.: (98-56455, 56587, 80477, 80582, 80603)
Decision Date: September 6, 2002
Rehearing Denied: May 15, 2003
Questions Presented

~~Date~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~
Aug 8 2003	Petition for writ of certiorari filed. (Response due September 11, 2003)
Sep 2 2003	Waiver of right of respondent Richard Herman Ford to respond filed.
Sep 17 2003	DISTRIBUTED for Conference of October 10, 2003.
Oct 6 2003	Response Requested . (Due November 5, 2003)
Nov 3 2003	Order extending time to file response to petition to and including November 15, 2003.
Nov 17 2003	Motion for leave to proceed in forma pauperis filed by respondent .
Nov 17 2003	Brief of respondent Richard Herman Ford in opposition filed.
Nov 24 2003	Reply of petitioner Cheryl K. Pliler, Warden filed.
Dec 17 2003	DISTRIBUTED for Conference of January 9, 2004.
Jan 9 2004	Motion for leave to proceed in forma pauperis filed by respondent GRANTED.
Jan 9 2004	Petition GRANTED.
Feb 4 2004	Motion to appoint counsel filed by respondent.
Feb 11 2004	Motion DISTRIBUTED for Conference of February 27, 2004.
Feb 23 2004	Joint appendix filed.
Feb 23 2004	Brief of petitioner Cheryl K. Pliler, Warden filed.
Mar 1 2004	Motion to appoint counsel filed by respondent GRANTED. Lisa M. Bassis, Esq., of Los Angeles, California is appointed to serve as counsel for the respondent in this case.
Mar 2 2004	SET FOR ARGUMENT MONDAY, APRIL 26, 2004.
Mar 9 2004	Record received from U.S.C.A. 9th Circuit. (1 envelope)
Mar 12 2004	U.S.D.C. for the Central District of California record received from Chambers of Judge Stephen Reinhardt. (1 box)
Mar 23 2004	CIRCULATED.
Mar 26 2004	Brief amicus curiae of National Association of Criminal Defense Lawyers filed. (Distributed).
Mar 29 2004	Motion for leave to file amicus brief filed by Federal Defenders in the Ninth Circuit. (Distributed)
Mar 29 2004	Brief of respondent Richard Herman Ford filed. (Distributed)
Apr 13 2004	Motion of National Association of Criminal Defense Lawyers for leave to participate in oral argument as amicus curiae and for divided argument filed.
Apr 14 2004	Reply of petitioner Cheryl K. Pliler, Warden filed. (Distributed)
Apr 16 2004	Motion for leave to file amicus brief filed by Federal Defenders in the Ninth Circuit GRANTED.

Apr 16 2004	Motion of National Association of Criminal Defense Lawyers for leave to participate in oral argument as amicus curiae and for divided argument DENIED.
Apr 26 2004	Argued. For petitioner: Paul M. Roadaramel, Jr., Deputy Attorney General, Los Angeles, Cal. For respondent: Lisa M. Bassis, Los Angeles, Cal. (Appointed by this Court.)

(1) 03 221 AUG 8 - 2003

No. OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

CHERYL K. PLILER, Warden of California State Prison - Sacramento, *Petitioner,*

v.

RICHARD HERMAN FORD, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. This Court held over twenty years ago that "a district court must dismiss habeas petitions containing both unexhausted and exhausted claims." *Rose v. Lundy*, 455 U.S. 509, 522 (1981). The question presented is:

Whether the dismissal of such a "mixed" habeas petition is improper unless the district court informs the petitioner about the possibility of a stay of the proceeding pending exhaustion of state remedies and advises the petitioner with respect to the statute of limitations in the event of any refiling.

2. Under Federal Rule of Civil Procedure 15(c), "[a]n amendment of a pleading relates back to the date of the original pleading when relation back is permitted by the law that provides the statute of limitations applicable to the action, or [¶] . . . the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading . . . ." The question presented is:

Whether a second, untimely habeas petition may relate back to a first habeas petition, where the first habeas petition was dismissed and the first proceeding is no longer pending.

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IN THE SUPREME COURT OF THE UNITED STATES

No. _____

CHERYL K. PLILER, Warden of California State Prison - Sacramento, *Petitioner,*

v.

RICHARD HERMAN FORD, *Respondent.*

_____

PETITION FOR WRIT OF CERTIORARI

Cheryl K. Pliler, Warden of California State Prison—Sacramento, at Represa, California (hereafter the Warden), respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.[1/]

OPINION OR JUDGMENT BELOW

The opinion of the Ninth Circuit is reported as *Ford v. Hubbard*, 305 F.3d 875 (9th Cir. 2002), *amended by* 330 F.3d 1086 (9th Cir. 2003), and is reproduced in pages A1 to A45 of the Appendix (App.) to this petition. The orders of the District Court denying habeas corpus relief are unreported and are reproduced in pages B1 to B8, C1 to C9, D1 to D5, and E1 to E7 of the Appendix. The opinions of the California Court of

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1. In the proceedings below, Warden Suzan Hubbard was listed as respondent Richard Herman Ford's custodian. Ford's present custodian is Cheryl K. Pliler.

Appeal certified for publication and partial publication are reported as *People v. Von Villas*, 11 Cal. App. 4th 175, 15 Cal. Rptr. 2d 112 (1992), and *People v. Von Villas*, 10 Cal. App. 4th 210, 13 Cal. Rptr. 2d 62 (1992), respectively.

STATEMENT OF JURISDICTION

The judgment of the Ninth Circuit affirming in part, vacating in part, and remanding with instructions, was amended and entered on May 15, 2003. The Ninth Circuit denied the Warden's petition for rehearing with suggestion for rehearing en banc on May 15, 2003. The jurisdiction of this Court is timely invoked under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

Section 2244 of Title 28 of the United States Code provides in pertinent part:

> (d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of –
>
> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.
>
> (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

Section 2254 of Title 28 of the United States Code provides in pertinent part:

> (b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that –
>
> (A) the applicant has exhausted the remedies available in the courts of the State . . . .

Rule 15 of the Federal Rules of Civil Procedure provides in pertinent part:

> (c) Relation Back of Amendments. An amendment of a pleading relates back to the date of the original pleading when
>
> (1) relation back is permitted by the law that provides the statute of limitations applicable to the action, or
>
> (2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading . . . .

STATEMENT OF THE CASE

On October 11, 1988, respondent Richard Herman Ford and Anthony Von Villas, both former Los Angeles Police Department officers, were convicted of first-degree murder for financial gain and conspiracy to commit murder for killing small-business owner Thomas Weed (hereafter the Weed Case). After the jury deadlocked during the penalty phase of Ford's trial, the trial court sentenced him to life without the possibility of parole.

On November 16, 1992, in a published opinion, the California Court of Appeal affirmed the judgment of conviction as to Ford. *See Von Villas*, 11 Cal. App. 4th at 257-61, 15 Cal. Rptr. 2d at 162-65. Ford's petition for review in the California Supreme Court was denied. A petition for writ of certiorari was denied by this Court on October 4, 1993. *See Ford v. California*, 510 U.S. 838 (1993).

In a separate trial, Ford and Von Villas were also convicted of conspiracy to commit another murder; the charge named Joan Loguercio as the target (hereafter the Loguercio Case). In addition, Ford and Von Villas were convicted of two counts of attempted murder involving Loguercio, as well as robbery, conspiracy to commit robbery, and assault with a firearm. Ford alone was convicted of attempted administration of an intoxicating agent. On March 11, 1989, Ford received a sentence of thirty-six years to life.

On October 9, 1992, in a partially-published opinion, the California Court of Appeal affirmed the judgment of conviction. *See Von Villas*, 10 Cal. App. 4th at 274-75, 13 Cal. Rptr. 2d at 107. Ford's petition for review in the California Supreme Court was denied. A petition for writ of certiorari was denied by this Court on June 14, 1993. *See Ford v. California*, 508 U.S. 975 (1993).

On April 19, 1997, five days before the expiration of the one-year limitation period under the Antiterrorism and Effective Death Penalty Act of 1996 (hereafter the AEDPA), *see* 28

U.S.C. § 2244, Ford signed and delivered to prison authorities a *pro se* petition for writ of habeas corpus challenging his conviction in the Weed Case; the petition was forwarded to the clerk and filed in the United States District Court for the Central District of California on May 5, 1997. In a judgment entered on October 14, 1997, the district court dismissed the petition without prejudice due to Ford's failure to exhaust his state remedies as to several claims. App. D1-D5. Prior to the dismissal, Ford was given the option of dismissing his unexhausted claims and proceeding on the exhausted claims, in an apparent attempt to avoid the application of the AEDPA's limitation period; Ford was also informed that any failure to respond to the court's inquiry would result in the dismissal of the petition. App. D1-D2. When Ford did not respond, the petition was dismissed without prejudice. App. D2-D5. No appeal was filed.

On the same day Ford submitted his petition in the Weed Case, he also signed and delivered to prison authorities a *pro se* petition challenging his conviction in the Loguercio Case; that petition was likewise filed in the United States District Court for the Central District of California on May 5, 1997. As in the Weed Case, the petition was unexhausted and the magistrate judge gave Ford the choice of dismissing the unexhausted claims and proceeding with only the exhausted claims, or suffering dismissal of the petition. App. E2-E4. Although Ford filed a motion to stay the proceedings pending exhaustion, he elected not to delete the unexhausted claims, but to dismiss the petition. App. E2. The petition was accordingly dismissed without prejudice in a judgment entered on September 12, 1997, after the expiration of the AEDPA's limitation period. App. E7. Again, no appeal was filed (the petitions filed in 1997 are collectively referred to hereafter as the First Petitions). Ford unsuccessfully sought relief in state court on his unexhausted claims after the First Petitions were dismissed.

On April 7, 1998, Ford returned to federal court and filed a second petition challenging his conviction in the Weed Case.

In a judgment entered on June 30, 1998, the district court dismissed the petition with prejudice as untimely under the AEDPA. App. C1-C9. A second petition challenging Ford's conviction in the Loguercio Case was filed the same day, and likewise dismissed with prejudice as untimely in a judgment entered on July 27, 1998 (the petitions filed in 1998 are collectively referred to hereafter as the Second Petitions). App. B1-B8.

Ford appealed the dismissals of the Second Petitions. The Ninth Circuit consolidated the appeals and granted Ford's request for a certificate of appealability "on the question whether his federal habeas petitions were timely under AEDPA's one-year statute of limitations . . . ." App. A21.

In a published decision authored by Judge Reinhardt and joined by Judge Pregerson, with Judge Silverman dissenting, the majority held that because "[t]he district court did not . . . inform Ford that it would not have the power to consider his motions to stay the [first] petitions unless he opted to amend them and dismiss the then-unexhausted claims," Ford's decision "to have his timely-filed federal habeas petitions dismissed without prejudice was an uninformed one . . . ." App. A14-A15. The majority also held that the district court erred by failing to advise Ford "that his federal claims would be time-barred, absent cause for equitable tolling, upon his return to federal court if he opted to dismiss the petitions 'without prejudice' and return to state court to exhaust all of his claims." App. A15. Finally, the majority held that because the dismissals of the First Petitions were therefore "improper," the claims that were included in the First Petitions and then reasserted in the Second Petitions were not time-barred under the AEDPA, but "relate[d] back to and preserve[d] the filing date of the initial petitions." App. A15.

The majority vacated the district court's dismissal of the Second Petitions insofar as they contained claims originally raised in the First Petitions, and remanded those claims for reconsideration on the merits. Five claims newly raised in the

Second Petitions were remanded for development of a factual record as to whether the statute of limitations should be equitably tolled. Finally, the majority affirmed the dismissal of two ineffective assistance of counsel claims raised for the first time in the second Loguercio Case. App. A40.

The Warden's petition for rehearing with suggestion for rehearing en banc in the Ninth Circuit was denied on May 15, 2003. App. A13.

On May 21, 2003, the Warden filed a motion to stay the issuance of the mandate in the Ninth Circuit. On May 28, 2003, the Ninth Circuit granted the motion.

REASONS FOR GRANTING THE WRIT

I.

The Ninth Circuit has decided an important and recurring issue regarding the dismissal of mixed habeas petitions under *Rose v. Lundy* in a way that conflicts with decisions of this Court, promotes a stay and abeyance procedure of unlikely merit, places a significant burden on the district courts, and is inconsistent with decisions of other circuit courts of appeals.

Disregarding over twenty years of Supreme Court precedent, the majority in this case holds for the first time anywhere that the dismissal of a mixed petition is "improper" and constitutes "prejudicial" error, unless a district court first informs a habeas petitioner that it does "not have the power to consider [any] motion[] to stay the petition[] unless he opt[s] to amend [it] and dismiss the then-unexhausted claims." App. A14. According to the majority, where such an advisement is not provided a petitioner's decision "to have his timely-filed federal habeas petitions dismissed without prejudice [is] an uninformed one . . . ." App. A15. This Court has never endorsed that approach. Instead, this Court has flatly held that "a district court *must* dismiss habeas petitions containing both

unexhausted and exhausted claims." *Rose v. Lundy*, 455 U.S. at 522 (emphasis added). The advisement required by the majority in this case promotes the improper goal of stay and abeyance, a procedure which is inconsistent with the responsibilities that attend a federal court's assumption of jurisdiction over a case challenging a final state criminal conviction.

"Boldly going where no court has gone before," App. A42 (Silverman, J., dissenting), the majority also requires district courts to provide warnings about the AEDPA's limitation period before dismissing a mixed petition. Specifically, district courts must now advise a habeas petitioner "that his federal claims would be time-barred, absent cause for equitable tolling, upon his return to federal court if he opt[s] to dismiss the petition[] 'without prejudice' and return to state court to exhaust all of his claims." App. A15. Again, this Court has never required such warnings or advisements; nor has it ever held that their absence renders the dismissal of a mixed petition erroneous. *See Duncan v. Walker*, 533 U.S. 167, 178-79 (2001); *Rose v. Lundy*, 455 U.S. at 522. As the dissent observes, "[i]t is one thing to construe a pro se petitioner's pleadings liberally, and to require the district court to explain its reasons for dismissing a complaint. It is quite another thing to require the district court judge to act as petitioner's legal advisor." App. A43.

At least three other circuit courts of appeals have rejected the majority's approach in this case. Thus, the majority's decision conflicts with *Rose v. Lundy*, institutionalizes a stay and abeyance procedure of dubious merit, imposes new and onerous burdens on district courts in connection with the dismissal of mixed habeas petitions, and clashes with the holdings of other federal appellate courts.

1. This Court has repeatedly held that "because a total exhaustion rule promotes comity and does not unreasonably impair the prisoner's right to relief, . . . a district court must dismiss habeas petitions containing both unexhausted and

exhausted claims." *Rose v. Lundy*, 455 U.S. at 522; *id.* at 518-19 ("A rigorously enforced total exhaustion rule will encourage state prisoners to seek full relief first from the state courts, thus giving those courts the first opportunity to review all claims of constitutional error"); *see also Coleman v. Thompson*, 501 U.S. 722, 731 (1991) ("This Court has long held that a state prisoner's federal habeas petition should be dismissed if the prisoner has not exhausted available state remedies as to any of his federal claims"); *Castille v. Peoples*, 489 U.S. 346, 349 (1989) ("Respondent's habeas petition should have been dismissed if state remedies had not been exhausted as to any of the federal claims"); *Teague v. Lane*, 489 U.S. 288, 325 (1989) (Stevens, J., concurring) ("In *Rose v. Lundy*, . . . the Court announced that a habeas petition containing exhausted and unexhausted claims must be dismissed"); *Engle v. Isaac*, 456 U.S. 107, 124 n.25 (1982) ("If [an unexhausted] claim were present, *Rose v. Lundy*, . . . would mandate dismissal of the entire petition").

More recently, in *Duncan v. Walker*, 533 U.S. at 167, this Court reaffirmed that principle by concluding that "[t]he exhaustion requirement [set forth in the AEDPA] ensures that the state courts have the opportunity fully to consider federal-law challenges to a state custodial judgment before the lower federal courts may entertain a collateral attack upon that judgment." *Id.* at 178-79. The *Duncan* majority also noted that "[t]olling the limitation period for a federal habeas petition that is dismissed without prejudice would . . . create more opportunities for delay and piecemeal litigation without advancing the goals of comity and federalism that the exhaustion requirement serves. We do not believe that Congress designed the statute in this manner." *Id.* at 180.

In this case, Ford failed to dismiss his unexhausted claims from the First Petitions, despite being given the opportunity to do so. As such, the majority's insistence that Ford's consent to the dismissals of the First Petitions was "uninformed" is beside the point; Ford was warned that the petitions would be

dismissed if he did not delete his unexhausted claims. When Ford ignored that warning, the district court did what it was supposed to do: it dismissed the mixed petitions in compliance with *Rose v. Lundy*. The majority's conclusion that the dismissals were "improper" is therefore inconsistent with controlling Supreme Court precedent.

2. Equally troubling is the majority's circumvention of the AEDPA's limitation period, through the establishment of a procedure whereby a mixed petition may be filed, unexhausted claims dismissed, and a stay of proceedings obtained for the purpose of exhausting the dismissed claims in state court. Thus, as long as a petitioner files one exhausted claim before the expiration of the statutory period, he may obtain a stay of the proceedings to exhaust any newly-presented claims, and later add those claims to the pending petition by way of amendment. If allowed to stand, the majority's holding would render the AEDPA's limitation period virtually irrelevant, and reduce district courts to "a jurisdictional parking lot." *Sterling v. Scott*, 57 F.3d 451, 454 (5th Cir. 1995). As this Court stated in *Rose v. Lundy*, "strict enforcement of the exhaustion requirement will encourage habeas petitioners to exhaust all of their claims in state court and to present the federal court with a single habeas petition." 455 U.S. at 520. The majority's holding will encourage the very opposite.

Indeed, when federal courts assume jurisdiction over a case, they have a "virtually unflagging obligation . . . to exercise the jurisdiction given them." *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817-18 (1976); *see also Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 716 (1996); *McCarthy v. Madigan*, 503 U.S. 140, 146 (1992); *In re Blodgett*, 502 U.S. 236, 239-40 (1992) (*per curiam*). This is especially true in habeas proceedings, where the finality of a state judgment of conviction is dependent upon the conclusion of federal review. Considerations of comity also compel the timely consideration of matters in *capital* habeas cases, because of their importance to the State, as well as the tendency of

petitioners in such cases to prolong the litigation unduly and thus delay the execution of judgment. *See In re Blodgett*, 502 U.S. at 239 ("The orders by the Ninth Circuit to vacate submission of the case until completion of the state collateral proceeding and then to hold the case in abeyance pending filing and resolution of the third federal habeas proceeding in the District Court raise the very concerns regarding delay that were part of the rationale for this Court's decision[] in *Rose v. Lundy*"); *but cf. Duncan v. Walker*, 533 U.S. at 182 (Souter, J., concurring) ("[N]othing bars a district court from retaining jurisdiction pending complete exhaustion of state remedies"); *see also id.* at 182-83 (Stevens, J., concurring) ("[I]n our post-AEDPA world there is no reason why a district court should not retain jurisdiction over a meritorious claim and stay further proceedings pending the complete exhaustion of state remedies").

3. The majority's holding in that regard conflicts with the decisions of at least two other circuit courts of appeals. In *Victor v. Hopkins*, 90 F.3d 276 (8th Cir. 1996), the Eighth Circuit held that district courts lack authority to hold mixed petitions in abeyance, even in capital cases. As the court stated:

> We conclude that any suggestion in our prior cases that a district court has broad discretion to hold in abeyance a habeas petition including both exhausted and unexhausted claims pending exhaustion of state remedies is contrary to the Supreme Court's explicit directions in *Rose v. Lundy*. . . . The correct view is represented by our line of cases . . . in which we have given recognition to the clear teaching of *Rose v. Lundy* regarding the treatment of mixed petitions. Accordingly, we hold that the District Court has no authority to hold Victor's mixed petition in abeyance or to maintain the stay of execution. The choices stated in *Rose v. Lundy* are the only options available to a habeas

petitioner.

Id. at 282; *see also Jackson v. Dormire*, 180 F.3d 919, 920 (8th Cir. 1999) (following *Victor*); *Carmichael v. White*, 163 F.3d 1044, 1045 (8th Cir. 1998) (same).

In *Sterling v. Scott*, 57 F.3d at 451, the Fifth Circuit upheld the district court's dismissal of a mixed habeas petition in a capital case:

> As referred to earlier, 28 U.S.C. § 2254(b) provides that an application for a writ of habeas corpus "shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State." . . . The district court must also dismiss a mixed petition, such as Sterling's petition, containing both exhausted and unexhausted claims. . . . Accordingly, the district court was correct in dismissing Sterling's amended federal petition for failing to exhaust his state remedies as required in § 2254, and the district court did not err in refusing to hold in abeyance a petition over which it simply and plainly had no jurisdiction. . . .

Id. at 454; *see also Alexander v. Johnson*, 163 F.3d 906, 908 (5th Cir. 1998) ("A habeas petition containing both exhausted and unexhausted claims is a 'mixed' petition which should be dismissed without prejudice"); *Whitehead v. Johnson*, 157 F.3d 384, 387 (5th Cir. 1998) ("A federal habeas petition should be dismissed if state remedies have not been exhausted as to all of the federal court claims"); *McGrew v. Texas Bd. Of Pardons & Paroles*, 47 F.3d 158, 161 (5th Cir. 1995) ("McGrew's allegations reflect that he has not exhausted his state remedies and, therefore, insofar as his complaint can be construed as seeking habeas relief, it must be dismissed for failure to exhaust").

4. Moreover, no court (other than *Ford*) has ever held that a district court must advise a habeas petitioner that his federal claims may be time-barred, absent any equitable tolling, if he chooses to dismiss a mixed petition and return to state court to exhaust his newly-presented claims. As the dissent points out, the majority's decision "fails to take account of the fact that the district judge will almost never be able to tell, solely from the face of the petition, that the statute of limitations has expired." App. A42. Indeed, the absence of adequate documentation in that regard may very well result in misadvisement. Other problems abound:

> Numerous factors can affect a petitioner's decision to delete unexhausted claims and proceed with an amended petition, rather than accept dismissal without prejudice so that unexhausted claims can be pursued in state court. For example, the meritoriousness of the unexhausted claims is an extremely important factor; so is the fact that the failure-to-exhaust might foreclose those claims forever. The availability of key witnesses is another factor. The statute of limitations is only one element in the equation, and a fact-intensive one at that. Leaving aside the question of the proper role of the court as a neutral arbiter, the district court simply is in no position to identify all of the considerations that pertain. I respectfully suggest that it is the office of the court to fairly and impartially decide the case before it, not to act as the petitioner's paralegal.

App. A43 (Silverman, J., dissenting).

The majority's holding imposes an unwarranted burden upon district courts, and blurs the distinction between impartial decision-making and advocacy. This Court has never required any warnings or advisements regarding the AEDPA's limitation period, nor has it ever held that their absence renders the

dismissal of a mixed petition erroneous, as the majority concludes. *See Duncan v. Walker*, 533 U.S. at 178-79; *Rose v. Lundy*, 455 U.S. at 522.

5. The majority's requirement that petitioners be advised of the AEDPA's limitation period is also inconsistent with the Second Circuit's holding in *Warren v. Garvin*, 219 F.3d 111 (2d Cir. 2000). There, the appellant argued that his second habeas petition should be treated as a motion for relief from judgment pursuant to Rule 60(b) of the Federal Rules of Civil Procedure, and regarded as a continuation of his first petition; the appellant maintained that such relief was warranted because he was not warned in the first proceeding that the AEDPA's limitation period would preclude him from refiling. *Id.* at 114. In rejecting that argument, the Second Circuit held:

> Warren contends that he is entitled to relief "because [he] was never informed of the effect of a dismissal on his ability to bring a subsequent petition." However, appellant knew of the 1-year limitations period for habeas petitions under the AEDPA, and his failure to timely refile (or to pursue his additional state claims) is merely garden variety neglect. Because "excusable neglect" is a ground for relief under Rule 60(b)(1), it cannot be considered under Rule 60(b)(6). Therefore, Warren's petition, even if treated as a motion under Rule 60(b), must be denied.

Id. at 114-15; *see also Zarvela v. Artuz*, 254 F.3d 374, 378, 380 (2d Cir. 2001) (citing *Warren*).[2/]

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2. The majority relies upon *Zarvela* in support of its holding requiring advisements regarding the statute of limitations. *See* App. A31. As the dissent notes, however,

> even that case does not hold that it is error to dismiss a mixed petition without prejudice unless the petitioner is informed about the statute of limitations. . . . *Zarvela* says that a district court faced with a mixed petition should advise a petitioner that his options are either to proceed with only the exhausted claims, or to return to state court. The most that *Zarvela* says about the statute of limitations is that it might be "useful" for the district court to alert a petitioner to the AEDPA statute of limitations. . . . This is a far cry from what the majority holds today.

App. A43-A44.

Resolution of this conflict between the circuits is vital to the proper and consistent application of this Court's precedent.

II.

The Ninth Circuit's interpretation of Federal Rule of Civil Procedure 15(c) is contrary to law, effectively nullifies the AEDPA's limitation period, and is inconsistent with decisions of other circuit courts of appeals.

Certiorari should be granted, also, because the majority's interpretation of the "relation back doctrine" is contrary to Rule 15(c) of the Federal Rules of Civil Procedure, circumvents the AEDPA's one-year limitation period, and is inconsistent with decisions of at least six other circuit courts of appeals. It also rests upon the erroneous premise that, because the district court did not provide the advisements discussed above, the district court's dismissals of the mixed petitions were improper. *See Rose v. Lundy*, 455 U.S. at 522.

1. The Warden submits at the outset that there is a serious question of whether the relation back doctrine applies to habeas corpus proceedings. Rule 81(a)(2) of the Federal Rules of Civil Procedure provides that the Rules govern habeas corpus cases "to the extent that the practice in such proceedings is not set forth in statutes of the United States, [or] the Rules Governing Section 2254 Cases, . . . and has heretofore conformed to the practice in civil actions." Rule 11 of the Rules Governing Section 2254 Cases provides that "[t]he Federal Rules of Civil Procedure, to the extent that they are not

inconsistent with these rules, may be applied, when appropriate, to petitions filed under these rules." *See also Harris v. Nelson*, 394 U.S. 286, 295 (1969) (the drafters' intent with respect to the 1938 creation of the Federal Rules of Civil Procedure "indicates nothing more than a general and nonspecific understanding that the rules would have very limited application to habeas corpus proceedings").

Rule 15(c) applies only to proceedings that are governed by a statute of limitations. Indeed, the Advisory Committee Notes to Rule 15(c) state in pertinent part that "[r]elation back is intimately connected with the policy of the statute of limitations." *See also Order of R.R. Telegraphers v. R.R. Express Agency, Inc.*, 321 U.S. 342, 348-49 (1944) (rationale of statute of limitations in civil actions is to prevent the bringing of stale claims); *compare Teague v. Lane*, 489 U.S. at 306 (O'Connor, J.) (purpose of habeas corpus jurisprudence is to leave "'concluded litigation in a state of repose'"). At the time of its enactment, Rule 15(c) did not govern the filing of habeas petitions, because there was no need for newly-presented claims to relate back to a previous filing. *See Harris v. Nelson*, 394 U.S. at 295-96. Until the AEDPA, there was no statutory limitation period which applied to habeas corpus proceedings. Thus, to apply Rule 15(c) to habeas corpus cases would be "inconsistent" with "the practice in such proceedings." *See* Fed. R. Civ. P. 81(a)(2); Rule 11, foll. 28 U.S.C. § 2254; *see also Harris v. Nelson*, 394 U.S. at 294 ("Habeas corpus practice in the federal courts has conformed with civil practice only in a general sense").

2. Even assuming the relation back doctrine applies to habeas corpus cases, the majority has interpreted the doctrine in such a way as to nullify the AEDPA's limitation period. Rule 15(c) provides that an amendment of a pleading relates back to the date of the original pleading when "relation back is permitted by the law that provides the statute of limitations applicable to the action, or [¶] . . . the claim or defense asserted in the amended pleading arose out of the conduct, transaction,

or occurrence set forth or attempted to be set forth in the original pleading . . . ." Building upon the errors discussed previously, the majority holds that because the dismissals of the First Petitions were "improper," the claims that were included in the First Petitions and then reasserted in the Second Petitions were not time-barred under the AEDPA, but "relate[d] back to and preserve[d] the filing date of the initial petitions." App. A15.

No court (again, other than *Ford*) has ever held that an otherwise untimely habeas petition relates back to a prior habeas petition in a proceeding that was dismissed and is no longer pending. Indeed, in *Green v. White*, 223 F.3d 1001 (9th Cir. 2000), a different Ninth Circuit panel held that "[a] second habeas petition does not relate back to a first habeas petition when the first habeas petition was dismissed for failure to exhaust state remedies." *Id.* at 1003. As the dissent in this case observes:

> Ford never appealed the dismissal of [the First Petitions]. (He still hasn't.) What he did instead was go back to state court and exhaust his remaining claims. He eventually returned to federal court and filed the new petitions that are the subject of this appeal. By that time, the statute of limitations had run and the petitions were dismissed as time-barred.
>
> This was precisely the situation we upheld in *Green* . . . . Green's first, timely petition was dismissed without prejudice "apparently because Green had not exhausted his state remedies as to some claims." . . . After exhausting his state remedies, Green returned to federal court. Like Ford, his claims had become time-barred.

App. A41 (citing *Green v. White*, 223 F.3d at 1002); *see also id.* at A41 ("Because *Green* is identical to the present case in all material respects, the majority is forced to concoct a way around

it").[3/]

The potential impact of the majority's holding is enormous: habeas petitions filed long after the expiration of the AEDPA's limitation period would be rendered timely through relation back to a prior petition in a different proceeding, *even though that proceeding had been dismissed and was no longer pending*. The Fifth Circuit recently rejected such an approach in a similar situation:

> [I]f § 2244(d) were interpreted as Petitioner argues, the result would be impractical. A habeas petitioner could file a non-exhausted application in federal court within the limitations period and suffer a dismissal without prejudice. He could then wait decades to exhaust his state court remedies and could also wait decades after exhausting his state remedies before returning to federal court to "continue" his federal remedy, without running afoul of the statute of limitations.
>
> . . . Construing an application filed after a previous application is dismissed without prejudice as

---

3. The dissent also criticizes the majority's citation of supporting authority that was issued after the original decision in this case:

> The majority's reliance on *Kelly v. Small*, 315 F.3d 1063 (9th Cir. 2003), is simply bizarre. The amended *Kelly* opinion was filed after the original opinion in this case (*Ford*) and relies on the original *Ford* opinion for support. *Id.* at 1070-71. Now, in *its* amended opinion, the majority in *this* case (*Ford*), relies on *Kelly*, which in turn relies on *Ford*. The wacky circularity of all of this does not change the fact that it was the *Ford* majority in *this* case that originally cooked up the rule on which the *Kelly* court relied, and with which I respectfully disagree for the reasons I've given.

App. A44 (emphasis in original).

> a continuation of the first application for all purposes would eviscerate the AEDPA limitations period and thwart one of AEDPA's principal purposes. . . .

Graham v. Johnson, 168 F.3d 762, 780 (5th Cir. 1999) (quoting in part the district court's decision dismissing a second habeas petition as untimely).

3. At least six other circuit courts of appeals have expressly declined to apply the relation back doctrine to a former habeas proceeding. *See Neverson v. Bissonnette*, 261 F.3d 120, 126 (1st Cir. 2001) (relation back doctrine did not apply where the dismissal of initial habeas proceeding left "nothing to which Petition No. 2 could relate back"); *see also Newell v. Hanks*, 283 F.3d 827, 834 (7th Cir. 2002); *Marsh v. Soares*, 223 F.3d 1217, 1219-20 (10th Cir. 2000); *Warren v. Garvin*, 219 F.3d at 113; *Nyland v. Moore*, 216 F.3d 1264, 1266 (11th Cir. 2000); *Jones v. Morton*, 195 F.3d 153, 160-61 (3d Cir. 1999); *cf. Hunt v. Hopkins*, 266 F.3d 934, 936-37 (8th Cir. 2001) (amended petition related back to prior petition in *same* proceeding because *action* had not been dismissed).

Given the Ninth Circuit's unwarranted extension of the relation back doctrine and the conflict between the circuits, guidance from this Court is now necessary.

CONCLUSION

The petition for writ of certiorari should be granted.

Dated: August 8, 2003

Respectfully submitted,

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RICHARD HERMAN FORD, Petitioner-Appellant, **v.** **S. HUBBARD, Warden; DANIEL E. LUNGREN, Attorney General,** Respondents-Appellees.	No. 98-56455 D.C. No. CV-98-02557-RAP-SH
RICHARD HERMAN FORD, Petitioner-Appellant, **v.** **S. HUBBARD, Warden; ATTORNEY GENERAL OF THE STATE OF CALIFORNIA,** Respondents-Appellees.	No. 98-56587 D.C. No. CV-98-02556-RAP (SH)
RICHARD HERMAN FORD, Petitioner, **v.** **UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA,** Respondent, S. HUBBARD, Warden, Real Party in Interest.	No. 98-80477 D.C. No. CV-97-03385-RAP/SH

RICHARD HERMAN FORD,
Petitioner,

v.

S. HUBBARD, Warden,
Respondent.

No. 98-80582

D.C. No.
CV-97-03385-
RAP/SH

RICHARD HERMAN FORD,
Petitioner,

v.

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA,
Respondent,

S. HUBBARD, Warden,
Real Party in Interest.

No. 98-80603
D.C. No.
CV-97-03385-
RAP/SH

ORDER
AMENDING
OPINION, AND
DENYING
REHEARING
AND
REHEARING
EN
BANC AND
AMENDED
OPINION

Appeal from the United States District Court
for the Central District of California
Richard A. Paez, District Judge, Presiding

Argued and Submitted November 6, 2001
Submission vacated June 10, 2002
Re-Submitted July 24, 2002
Pasadena, California

Filed September 6, 2002
Amended May 15, 2003

Before: Harry Pregerson, Stephen Reinhardt and
Barry G. Silverman, Circuit Judges.

Opinion by Judge Reinhardt;
Dissent by Judge Silverman

SUMMARY

Criminal Law and Procedure/Habeas Corpus

The court of appeals affirmed a judgment of the district court in part, vacated in part, and remanded. The court held that a district court, when informing a habeas petitioner of his options with respect to a petition containing both exhausted and unexhausted state claims, should alert the petitioner to the one-year limitations period of the Antiterrorism and Effective Death Penalty Act (AEDPA) and to the fact that a portion of that period has already elapsed.

Appellant Richard Ford was convicted in California state court, in two separate prosecutions, of, among other things, first-degree murder, conspiring to commit murder, and attempted murder. Ford was sentenced to various terms of custody in the two cases, including life without the possibility of parole. On appeal, the California Court of Appeal affirmed his convictions, and his petitions for review of the California Supreme Court were denied. Ford then petitioned for writs of certiorari in the United States Supreme Court, which were also denied. Several days prior to the expiration of AEDPA's limitations period, Ford filed *pro se* federal habeas corpus petitions with motions to stay the petitions containing exhausted grounds while he exhausted the then-unexhausted state claims. The magistrate judge issued an order giving him the choice of

either (1) dismissing the petition without prejudice and re-filing after exhaustion of the unexhausted claims or (2) dismissing the unexhausted claims and proceeding with only the exhausted claims. Ford opted to have the petition dismissed in order to exhaust his unexhausted claims. The magistrate judge issued a report recommending that the district court dismiss the habeas petitions without prejudice because they were partially exhausted petitions. However, the district court did not inform Ford that the AEDPA one-year statute of limitations had expired during the pendency of his federal habeas petitions so that, if he chose to dismiss his federal petitions and returned to state court to exhaust all of his claims, he would be time-barred when he attempted to re-file his federal claims. The district court adopted the magistrate's report and dismissed Ford's petitions, purportedly without prejudice.

Ford filed state habeas corpus petitions in the California Supreme Court, which were summarily denied. Shortly thereafter, Ford returned to federal district court and filed second *pro se* federal habeas corpus petitions. The magistrate issued a report recommending that Ford's petitions be dismissed with prejudice as untimely under AEDPA. The district judge adopted the magistrate's report and dismissed the petitions as time-barred.

Ford appealed, and the two cases were consolidated.

[1] The rights of *pro se* litigants require careful protection when highly technical requirements are involved, especially when enforcing those requirements might result in the loss of the opportunity to prosecute or defend a lawsuit on the merits. Before dismissing a *pro se* complaint, the district court must provide the litigant with notice of the deficiencies in his complaint in order to ensure that the litigant uses the opportunity to amend effectively. **[2]** Given that Ford was proceeding *pro se*, the district court was obligated to inform him of his options with respect to his mixed habeas petitions: to advise him that it would have the power to consider his stay motions only if he opted to proceed with his exhausted claims

and dismiss the unexhausted claims. **[3]** The district court's failure to explain the procedural deficiency that precluded it from granting Ford's stay motions deprived Ford of a fair and informed opportunity to have his stay motions heard, to exhaust his unexhausted claims, and ultimately to have his claims considered on the merits. Thus, it had to be held that the district court's action constituted prejudicial error. **[4]** The district court further erred when it failed to inform Ford that, on the face of the complaints, he would be time-barred under AEDPA on all of his claims if he either failed to amend his petitions or chose the option of dismissing them and returning to state court to exhaust the unexhausted claims. Although Ford timely filed both of his initial federal habeas petitions, he was only timely by a few days. Because AEDPA's one-year limitations period is not statutorily tolled during the pendency of a federal habeas petition, the statute of limitations was still running during the four-month period before the magistrate judge issued his findings and recommendations. Thus, when the district court gave Ford the option to dismiss his petitions and return to state court to exhaust his then-unexhausted claims, his time for filing new federal petitions had already expired by more than four months. **[5]** As a result, the district court misled Ford by informing him that if he opted to dismiss the petitions to return to state court to exhaust his claims, the dismissal would be without prejudice. A district court, when informing a habeas petitioner of his options with respect to a mixed petition, should alert the petitioner to the one-year limitations period of AEDPA and to the fact that a portion of that period has already elapsed. The district court's failure to alert Ford to the current status of his claim under the AEDPA one-year statute of limitations clearly deprived him of the opportunity to make a meaningful choice between the two options, and inevitably resulted in the subsequent dismissal of all of Ford's claims as time-barred. As such, the district court's failure fairly or fully to explain the consequences of the options it presented to Ford constituted the prejudicial error. **[6]** Had

the district court fairly and properly explained Ford's options to him, it would have been unlikely that his second petitions would have been dismissed as time-barred. **[7]** In order to ensure that Ford's rights were not unduly prejudiced as a result of the district court's errors, it had to be held that a *pro se* habeas petitioner who files a mixed petition that is improperly dismissed by the district court, and who then, following the district court's erroneous legal statements, returns to state court to exhaust his unexhausted claims and subsequently re-files a second petition without unreasonable delay, may employ the amendment procedures of Federal Rule of Civil Procedure 15 to have the second petition relate back to and preserve the filing date of the improperly dismissed initial petition. **[8]** Thus, the order dismissing the claims that were originally raised in Ford's initial federal habeas petitions and then re-filed in his second petitions as untimely had to be vacated and remanded to the district court for consideration on the merits.

Judge Silverman dissented, writing that requiring the district court to incorporate a warning about the statute of limitations when informing a habeas petitioner of his options with respect to a mixed petition is tantamount to requiring the district judge to improperly act as the petitioner's legal advisor.

COUNSEL

Lisa M. Bassis, Los Angeles, California, for the petitioner-appellant.

Bill Lockyer, Attorney General for the State of California; David P. Druliner, Chief Assistant Attorney General; Carol Wendelin Pollack, Senior Assistant Attorney General; Steven D. Matthews, Supervising Deputy Attorney General; and Paul M. Roadarmel, Jr., Deputy Attorney General, Los Angeles, California, for the respondents-appellees.

ORDER

The majority opinion filed September 6, 2002, slip op. 13341, and appearing at 305 F.3d 875 (9th Cir. 2002), is hereby amended as follows:

1. slip op. at 13347, line 18: after "*See*" and before the citation to *James v. Pliler*, insert "*Kelly v. Small*, 315 F.3d 1063, 1070-71 (9th Cir. 2003);"

2. slip op. at 13347, line 18: after the above new citation to *Kelly v. Small*, insert the following footnote: "As our dissenting colleague is well aware, in the course of confronting similar issues, the *Kelly* panel and this panel arrived at the same conclusions at approximately the same time, and filed their respective opinions within days of each other. Because we are part of a larger collegial body, and because it is our general practice to try to make our opinions as consistent as possible, both panels decided to make several harmonizing modifications to their originally filed opinions. Each panel amended its opinion to refer to the other, in part to make the coordination of our dispositions clear. We are, accordingly, puzzled that the dissent should find our action 'bizarre.' "

3. slip op. at 13347, line 28: after "(unless he could show that he was entitled to equitable tolling)," insert "*See Valerio v. Crawford*, 306 F.3d 742, 770-71 (9th Cir. 2002) (en banc), *cert. denied*, ___ S. Ct. ___ (2003)."

4. slip op. at 13348, line 23: after the citation to *Anthony v. Cambra*, insert ", *cert. denied*, 533 U.S. 941 (2001)."

5. slip op. at 13348, line 26: after the citation to *Zarvela v. Artuz*, insert ", *cert. denied*, 534 U.S. 1015."

6. slip op. at 13350, lines 10-11: replace " Ford did not do so. As a result, on September 10, 1997" with "On July 28, 1997, Ford instead opted to have the petition dismissed in order to exhaust his unexhausted claims. As a result, on August 5, 1997"

7. slip op. at 13353, n.4, line 5: replace "*Miranda & Wong Sun*" with "*Miranda and Wong Sun*"

8. slip op. at 13355, lines 14-15: replace "*Carey v. Saffold*, 122 S. Ct. 2134 (June 17, 2002) (No. 01-301)." with "*Carey v. Saffold*, 536 U.S. 214 (2002)."

9. slip op. at 13356, line 10: after the citation to *James v. Giles* and before "*see also Freeman v. Page*," insert "As we recently said in *Kelly v. Small*, 'The exercise of discretion to stay the federal proceeding is particularly appropriate when an outright dismissal will render it unlikely or impossible for the petitioner to return to federal court within the one-year limitation period imposed by [AEDPA].' *Kelly*, 315 F.3d at 1070;"

10. slip op. at 13356, line 13: after the citation to *Freeman v. Page*, insert ", *cert. denied*, 531 U.S. 946"

11. slip op. at 13357, n.6, lines 8-9: replace "*Wyatt v. Terhune*, 280 F.3d 1238, 1245-46 (9th Cir. 2001)" with "*Wyatt v. Terhune*, 315 F.3d 1108, 1118-19 (9th Cir. 2003)"

12. slip op. at 13358, line 20: after "(quoting *Freeman*, 208 F.3d at 577))" and before "Thus, the district court, by failing to inform. . .", insert "; *see also Kelly*, 315 F.3d at 1070 (finding that the decision 'to stay the federal proceeding is particularly appropriate when an outright dismissal will render it unlikely or impossible for the

petitioner to return to federal court within the one-year limitation period imposed by [AEDPA].')."

13. slip op. at 13358, line 36: after "a denial of the request would likely constitute error," replace "*See Zarvela*" with "As the First Circuit recently recognized, '[T]here is a growing consensus that a stay is required when dismissal could jeopardize the petitioner's ability to obtain federal review.' *Nowaczyk v. Warden, N.H. State Prison*, 299 F.3d 69, 79 (1st Cir. 2002); *see also Zarvela*"

14. slip op. at 13359, lines 2-3: replace "*see also James*, 269 F.3d at 1126" with "*James*, 269 F.3d at 1126"

15. slip op. at 13360, lines 30-31: replace "What the district court should have told Ford," with "Other circuits have also noted the deceptive nature of a dismissal without prejudice when the claims dismissed are time-barred; in *Rodriguez v. Bennett*, 303 F.3d 435 (2d Cir. 2002), for example, the Second Circuit explained that for a petitioner dismissed 'without prejudice' after a year in federal habeas proceedings, 'the 'without prejudice' provision was an illusion; petitioner could never succeed in timely refiling the petition because he would already be time-barred.' *Rodriguez*, 303 F.3d at 439. [¶] We have recognized a district court's obligation to avoid misleading petitioners. In *Valerio v. Crawford*, 306 F.3d 742 (2002), *cert. denied*, ___ S. Ct. ___ (2003), the en banc court instructed the district court to inform a petitioner when claims to be dismissed 'without prejudice' would actually be time-barred. *See Valerio*, 306 F.3d at 770-71. This simple step helps avoid the unnecessary forfeiture of petitioners' constitutional rights. Here, what the district court should have told Ford."

16. slip op. at 13361, line 7: after "choice between the two

options. *See* ," and before the citation to *James*, insert "*Valerio*, 306 F.3d at 770-71 (finding that the district court must inform the petitioner of a potential time-bar before the petitioner chooses whether to amend his mixed petition, in order to make that choice meaningful);"

17. slip op. at 13361, n.7, line 14: after "absent equitable toiling," and before "To do otherwise," insert "*See Valerio*, 306 F.3d at 770-71."

18. slip op. at 13363, line 30: after the citation to *Van Tran v. Lindsey*, insert ", *cert. denied*, 531 U.S. 944, *overruled on other grounds by Locker v. Andrade*, 123 S. Ct. 1166, ___ (2003)."

19. slip op. at 13364, n.10: replace n.10 with "*Compare Anthony*, 236 F.3d at 574 (holding that the district court's outright dismissal of Anthony's mixed petition without having adequately informed him of his options was 'improper') *and* discussion *supra* Sections II.A. & II.B. (explaining why Ford's initial habeas petitions were improperly dismissed) *with Anthony*, 236 F.3d at 574 n.1 (stating that the dismissal of the mixed habeas petitions in *Green, Van Tran*, and *Henry* were 'proper')."

20. slip op. at 13364, n.11, lines 1-3: replace "*See Jorss*, 266 F.3d at 957 n.1 (emphasizing that the petitioner in *Green* 'accepted' the proper dismissal of his mixed petition). Similarly, the petitioners in *Van Tran* and *Henry*" with "The petitioners in *Green, Van Tran* and *Henry*"

21. slip op. at 13366-67, n.14, lines 11-14: replace "; *Jorss v. Gomez*, 266 F.3d 955, 957-58 (9th Cir. 2001) (holding that the district court's erroneous dismissal of Jorss's timely-filed habeas petition as unexhausted constitutes an extraordinary circumstance that equitably tolled AEDPA's

statute of limitations)." with ". The Fifth Circuit recently found similar circumstances appropriate for equitable tolling in the context of a prisoner's § 1983 suit dismissed ostensibly without prejudice for failure to exhaust administrative remedies. In *Clifford v. Gibbs*, 298 F.3d 328 (5th Cir. 2002), the court recognized the impropriety of a dismissal without prejudice that actually left claims 'forever precluded.' *Id.* at 333. It held that claims should be equitably tolled when the 'district court's dismissal . . . without prejudice actually operates as a dismissal with prejudice because [the petitioner] is barred from returning to federal court after exhausting his remedies because limitations has already run.' *Id.* Ford faced the same constraints."

22. slip op. at 13369, line 3: after the citation to *Miranda v. Castro*, insert ", *cert. denied*, 123 S. Ct. 496"

23. slip op. at 13369, n.18, line 4: after the citation to *Frye v. Hickman*, insert ", *cert. denied*, 535 U.S. 1055 (2002)"

24. slip op. at 13369, n.18, line 6: after the citation to *Kreutzer v. Bowersox*, insert ", *cert. denied*, 534 U.S. 863 (2001)"

25. slip op. at 13369, n.18, line 9: after the citation to *United States v. Saro*, insert ", *cert. denied*, 534 U.S. 1149 (2002)"

26. slip op. at 13369, line 7: replace "*Calderon v. United States District Court (Beeler)*" with "*Calderon v. U.S. Dist. Court (Beeler)*" and after the *Beeler* parenthetical, at line 11, insert ", *overruled on other grounds by Calderon v. U.S. Dist. Court (Kelly)*, 163 F.3d 530, 540-41 (9th Cir. 1998) (en banc)."

27. slip op. at 13369, n.19, line 3: after the citation to *Fahy v.*

Horn, insert ", *cert. denied*, 534 U.S. 944"

28. slip op. at 13374, lines 17-18: replace "nor does any other case" with "nor does any other case involving a routine mixed petition."

29. slip op. at 13375, line 20: after "This is a far cry from what the majority holds today," insert the following two new paragraphs:

> The majority's reliance on *Valerio v. Crawford*, 306 F.3d 742 (9th Cir. 2002) (en banc) is likewise misplaced. *Valerio* involved highly unusual procedural circumstances of nearly Talmudic complexity, circumstances too convoluted to recount here. But in a nutshell, this court itself created a mixed petition for the petitioner by reinstating, on appeal, new unexhausted claims that had been dismissed by the district court for abuse of the writ. In a portion of the opinion entitled, "Procedure on Remand," the court sought to bring some order to the chaos by giving the district court detailed instructions on how to proceed from that point on, including the direction to inform Valerio of a possible time-bar in the event that the district court were to decline to follow the stay-and-abeyance procedure on remand. In no way, shape or form can *Valerio* be read to require *Miranda*-like warnings about the statute of limitations in the garden variety mixed-petition case.
>
> The majority's reliance on *Kelly v. Small*, 315 F.3d 1063 (9th Cir. 2003), is simply bizarre. The amended *Kelly* opinion was filed after the original opinion in this case (*Ford*) and relies on the original *Ford* opinion for support. Id. at 1070-71. Now, in *its* amended opinion, the majority in *this case* (*Ford*) relies on *Kelly*, which in turn relies on *Ford*. The wacky circularity of all of this does not change the fact that it was the *Ford* majority in *this* case that originally cooked up the rule on which the *Kelly* court relied, and with which I respectfully disagree for the reasons I've given.

30. slip op. at 13376, line 10: replace "Ford did not raise this equitable tolling issue in" with "Ford did not raise equitable tolling in"

31. slip op. at 13376, lines 11-12: replace "this appeal — not even" with "this appeal, not even"

With these amendments, the panel has voted to deny the petition for panel rehearing and the suggestion for rehearing en banc.

The full court was advised of the suggestion for rehearing en banc. A judge of the court requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc reconsideration. Fed. R. App. P. 35.

The petition for rehearing and the suggestion for rehearing en banc are DENIED.

OPINION

REINHARDT, Circuit Judge:

Richard Herman Ford, a California prisoner, appeals the district court's dismissal of his two habeas corpus petitions as time-barred under the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"), 28 U.S.C. § 2254(d). Both federal habeas petitions were initially timely filed in the district court by Ford proceeding *pro se*; however, both were "mixed" petitions containing exhausted as well as unexhausted claims.

Along with the mixed petitions, Ford filed motions to stay each of them while he exhausted the then-unexhausted claims in state court. The district court gave him the option with respect to both petitions of either dismissing the unexhausted claims and proceeding only with the exhausted claims or dismissing the petitions without prejudice and re-filing after exhaustion of the unexhausted claims. The district court did not, however, inform Ford that it would not have the power to consider his motions to stay the petitions unless he opted to amend them and dismiss the then-unexhausted claims. *See Kelly v. Small*, 315 F.3d 1063, 1070-71 (9th Cir. 2003);[1/] *James v. Pliler*, 269 F.3d 1124, 1126-27 (9th Cir. 2001); *Calderon v. District Court (Taylor)*, 134 F.3d 981, 989 (9th Cir. 1998). Although the magistrate's orders stated and the district court's orders reiterated that the dismissals were *without prejudice*, the district court also did not inform Ford that the AEDPA one-year statute of limitations had expired during the pendency of his federal habeas petitions so that, if he chose to dismiss his federal petitions and returned to state court to exhaust all of his claims, he would be time-barred when he attempted to re-file his federal claims (unless he could show that he was entitled to equitable tolling) *See Valerio v. Crawford*, 306 F.3d 742, 770-71 (9th Cir. 2002) (en banc), *cert.* denied, ___ S. Ct. ___ (2003).

Ford, still proceeding *pro se*, opted to have both petitions dismissed without prejudice and returned to state court to exhaust his remaining claims. When he re-filed his claims in

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1. As our dissenting colleague is well aware, in the course of confronting similar issues, the *Kelly* panel and this panel arrived at the same conclusions at approximately the same time, and filed their respective opinions within days of each other. Because we are part of a larger collegial body, and because it is our general practice to try to make our opinions as consistent as possible, both panels decided to make several harmonizing modifications to their originally filed opinions. Each panel amended its opinion to refer to the other, in part to make the coordination of our dispositions clear. We are, accordingly, puzzled that the dissent should find our action 'bizarre.'

federal court after exhausting all of them, however, the district court dismissed his petitions as time-barred.

We conclude that the district court erred by failing to inform Ford (1) that it could consider his stay motions only if he opted to amend the petitions and dismiss the then unexhausted claims, and (2) that his federal claims would be time-barred, absent cause for equitable tolling, upon his return to federal court if he opted to dismiss the petitions "without prejudice" and return to state court to exhaust all of his claims. Because Ford's decision to have his timely-filed federal habeas petitions dismissed without prejudice was an uninformed one, we conclude that the district court's dismissal of his initial federal habeas petitions without prejudice constituted prejudicial error.

We next address the district court's dismissal of Ford's second federal habeas petitions as time-barred, hold that the claims that were included in his initial petitions and then reasserted in his second petitions are not time-barred under AEDPA, and remand them for consideration on the merits. Specifically, we apply Federal Rule of Civil Procedure 15(c) to Ford's second petitions and hold that the second petitions relate back to and preserve the filing date of the initial petitions. *See Anthony v. Cambra*, 236 F.3d 568, 575-77 (9th Cir. 2000), *cert. denied*, 533 U.S. 941 (2001). In so doing, we follow the approach taken by the Second Circuit in *Zarvela v. Artuz*, 254 F.3d 374, 382-83 (2d Cir. 2001), *cert. denied*, 534 U.S. 1015.

With respect to the claims that were raised for the first time in Ford's second habeas petitions, we affirm the district court's dismissal of the two claims in the "Loguercio" case (No. CV 98-2557), but we vacate the dismissal of the five claims in the "Weed" case (No. CV 98-2556). We remand the additional Weed claims for an evidentiary hearing on equitable tolling. *See Whalem/Hunt v. Early*, 233 F.3d 1146, 1148 (9th Cir. 2000) (en banc).

I. PROCEDURAL BACKGROUND

A. The Loguercio Case

On January 6, 1988, Richard Ford and Robert Anthony Von Villas, both former Los Angeles police officers, were convicted of conspiring to murder John Loguercio and attempting to murder his wife in violation of California Penal Code §§ 182, 187, 664, and robbery, conspiracy to commit robbery, and assault with a firearm in violation of California Penal Code §§ 182, 211, 245(a)(2). Ford was also convicted of attempting to administer an intoxicating agent in violation of California Penal Code §§ 222, 664. On March 11, 1988, he was sentenced to thirty-six years to life in prison.

Ford appealed the judgment and, on October 9, 1992, the California Court of Appeal affirmed his conviction. He appealed to the California Supreme Court, but his petition for review was denied on January 14, 1993. He then filed a petition for a writ of certiorari in the United States Supreme Court, which was denied on June 14, 1993. *See Ford v. California*, 508 U.S. 975 (1993).

On April 19, 1997, Ford signed and delivered to the prison authorities a *pro se* federal habeas corpus petition. His petition was forwarded to the clerk and filed in the United States District Court for the Central District of California on May 5, 1997.[2/] Ford also filed a motion to stay the federal habeas

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2. In his initial federal petition, Ford claimed that he was entitled to relief on the following grounds: (1) trial court violated his confrontation clause rights when it quashed subpoena duces tecum issued by defense concerning freelance writer who had 10 hours of a taped interview with the chief prosecution witness about the case; (2) the defense was unconstitutionally burdened when the court excluded evidence of the writer's pecuniary interest as irrelevant; (3) trial court erred in not allowing evidence of prosecutorial misconduct on the basis of instructions to the police to cease interviewing witnesses; (4) trial court erred in not allowing the defense to present extrinsic evidence of third-party culpability; (5) trial court's refusal to allow evidence about the petitioner's wife's rape, tape recordings of the prosecution's key witness, and references to the co-defendant hampered the defense; (6) failure to allow evidence of specific acts of misconduct in order to impeach prosecution's prime witness was error; (7) jury misconduct resulting from the jury foreman producing his own "spread sheet," which was then used by the entire jury; (8) failure to suppress a general warrant lacking in specificity and particularity violated petitioner's rights under the Fourth & Fourteenth Amendments; (9) due process rights were denied by State's failure to preserve potentially favorable evidence; (10) trial court prejudicially refused to instruct the jury about the inferences to be drawn against People for loss of evidence seized pursuant to warrant; and (11) trial court erroneously refused to instruct that the jury that it had to be unanimous on each overt act of each conspiracy.

corpus petition containing exhausted grounds while he exhausted the then-unexhausted state claims. The magistrate judge, realizing that some of Ford's claims had not been exhausted, issued an order giving him the choice of either (1) dismissing the petition without prejudice and re-filing after exhaustion of the unexhausted claims or (2) dismissing the unexhausted claims and proceeding with only the exhausted claims. Under the magistrate's order, if Ford wanted to waive the unexhausted claims and proceed only on the exhausted claims, he was to so notify the court. On July 28, 1997, Ford instead opted to have the petition dismissed in order to exhaust his unexhausted claims. As a result, on August 5, 1997 the magistrate judge issued his report recommending that the district court dismiss the habeas petition without prejudice because it was a partially-exhausted petition under *Rose v. Lundy*, 455 U.S. 509, 522 (1982). In his report and recommendations, the magistrate judge stated that the court did not have the discretion to grant Ford's motion for a stay because the court could not stay a mixed petition. On September 11, 1997, the district court adopted the magistrate's report and dismissed Ford's petition, purportedly without prejudice.

On September 29, 1997, Ford filed a state habeas corpus petition in the California Supreme Court. His petition was

summarily denied on March 25, 1998. Ford then returned to federal court on April 7, 1998 and filed a second *pro se* federal habeas corpus petition in the district court.[3] On April 29, 1998, the state filed an answer and, on June 5, 1998, the state filed a motion to dismiss Ford's petition as untimely under AEDPA's one-year statute of limitations. On June 17, 1998, Ford filed an opposition to the motion. On June 26, 1998, the magistrate issued a report recommending that Ford's petition be dismissed with prejudice as untimely. Ford filed an objection to the report on July 16, 1998. On July 22, 1998, the district judge adopted the magistrate's report and dismissed the petition as time-barred.

On August 17, 1998, Ford filed a notice of appeal and moved for a certificate of appealability ("COA"). The district court denied his motion for a COA on August 25, 1998. Ford then sought a COA from this court and his motion was consolidated with a similar motion that he filed in the Weed case. *See infra* Section I.C.

B. The Weed Case

The procedural history of the Weed case is virtually identical. On October 11, 1988, Ford and Von Villas were convicted of first-degree murder and conspiracy to commit murder for killing Thomas Weed in violation of California Penal Code §§ 182, 187, 190.2(a)(1). After the jury deadlocked during the penalty phase of Ford's trial, the trial court sentenced him to life without the possibility of parole on the murder count and stayed a concurrent term of twenty-five years to life on the conspiracy count.

Ford appealed the judgment and, on November 16, 1992, the California Court of Appeal affirmed his convictions. On

3. In his second petition, Ford re-alleged all of the grounds from his initial petition and also alleged that he was entitled to relief because his trial and appellate counsel were constitutionally ineffective.

February 11, 1993, the California Supreme Court issued a summary denial of Ford's direct appeal. Ford filed a petition for a writ of certiorari in the United States Supreme Court, which was denied on October 4, 1993. *See Ford v. California*, 510 U.S. 838 (1993).

On April 19, 1997, Ford signed and delivered to the prison authorities a *pro se* federal habeas corpus petition. His petition was forwarded to the clerk and filed in the United States District Court for the Central District of California on May 5, 1997.[4] Ford also filed a motion to stay the federal habeas corpus petition containing exhausted grounds while he exhausted the then-unexhausted state claims. As in the Loguercio case, the magistrate judge gave Ford the choice of either (1) dismissing the petition without prejudice and re-filing after exhaustion of the unexhausted claims or (2) dismissing the unexhausted claims and proceeding with only the exhausted claims. The magistrate issued an order, however, in which he stated that the district court did not have the discretion to stay a mixed petition so that the motion to stay the proceedings was denied. Additionally, the order stated that Ford was to notify the

4. In his initial federal petition, Ford claimed that he was entitled to relief on the following grounds: (1) a tape recording was entered into evidence in violation of his constitutionally cognizable expectation of privacy; (2) there was Fourth Amendment violation because the seizure of evidence exceeded the scope of the warrant; (3) a warrant for a tape recording was obtained in violation of Title III, the Omnibus Crime Act, 18 U.S.C. § 2510 et seq.; (4) a tape recording was used in violation of his protected marital privilege and invaded his constitutional right to confidential communication;(5) Fourteenth Amendment violation resulting from a subsequent judge's action in changing the original judge's ruling on a PC § 995 motion; (6) due process violation resulting from an inaccurate ruling regarding "overt acts" among conspirators; (7) trial court's refusal to give the jury an instruction regarding the need for unanimous agreement on each specific overt act; (8) confrontation clause violation resulting from court's refusal to allow Ford to impeach the prosecution's witnesses about prior convictions and biases; (9) violation of the right to a fair trial resulting from admission of prejudicially misleading photographs; (10) misleading jury instruction on motive; and (11) ambiguous instruction on admissions.

court within approximately two and one-half weeks if he wanted to waive the unexhausted claims and proceed only on the exhausted claims. Ford did not so notify the court. As a result, on September 9, 1997, the magistrate judge issued his report recommending that the district court dismiss his habeas petition without prejudice because it was a partially exhausted petition under *Rose*, 455 U.S. at 522. On October 14, 1997, the district court adopted the magistrate's report and dismissed Ford's petition, purportedly without prejudice.

On October 24, 1997, Ford filed a state habeas corpus petition in the California Supreme Court. The petition was summarily denied on March 25, 1998. Ford then returned to federal court and, on April 7, 1998, he filed a second *pro se* federal habeas corpus petition in the district court.[5] The state filed an answer to the petition on April 29, 1998 and then, on May 11, 1998. filed a motion to dismiss alleging that the

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5. In his second petition, Ford re-alleged all of the grounds from his initial petition and also alleged the following new grounds: (1) prosecution erroneously used testimony obtained from a drugged alleged coconspirator; (2) the use of police agents to inculpate him by false testimony violated *Miranda* and *Wong Sun* and the Fourth, Fifth, Sixth, and Fourteenth Amendments; (3) prosecution misstated evidence and other case factors to cause the indictment and selective prosecution of Ford, which violated the truth-in-evidence doctrine and violated his constitutional rights; (4) judicial misfeasance, abuse of discretion, and nonfeasance misdirected the jury and violated Ford's rights to an impartial jury, due process, and equal protection; and (5) ineffective assistance of counsel.

Respondent also contends that Ford's assertion in his second petition that two exceptions to the Fourth Amendment warrant requirement do not apply to his case are new claims. The contentions, however, do not constitute claims, but are simply arguments in support of the claim of a Fourth Amendment violation — a claim that he asserted in his initial petition. Additionally, respondent contends that Ford's claim that "an investigative authority that has no coercion for, or authority over, jail security receives no deference for intrusions on inmate/citizen privacy" is newly-raised. Here, too, we hold that Ford has not asserted a claim but rather advanced an argument in support of the claims that he previously raised in grounds one and four of his initial petition, *see supra* note 3.

petition was untimely under AEDPA's one-year statute of limitations. Ford filed an opposition to the motion to dismiss on May 27, 1998 and the state filed its reply on June 1, 1998.

On June 3, 1998, the magistrate judge issued his report recommending that Ford's petition be dismissed with prejudice as untimely. On June 23, 1998, Ford filed an objection to the magistrate's report. On June 30, 1998, the district judge adopted the magistrate's findings, conclusions, and recommendations and dismissed Ford's petition with prejudice. On July 27, 1998, Ford filed a notice of appeal and a motion for a COA. The district court denied the motion on August 3, 1998. Ford then filed a motion for a COA in this court.

C. Consolidation Of Cases

On January 22, 1999, we consolidated Ford's two cases — the Weed case and the Loguercio case — and granted his request for a COA on the question whether his federal habeas petitions were timely under AEDPA's one-year statute of limitations, 28 U.S.C. § 2254(d).

II. ANALYSIS

We review a district court's decision to dismiss a petition for a writ of habeas corpus, including a dismissal on timeliness grounds, *de novo*. *See Miles v. Prunty*, 187 F.3d 1104, 1105 (9th Cir. 1999). Because Ford's convictions and sentences in both the Weed and Loguercio cases became final prior to the enactment of AEDPA, Ford had one year from AEDPA's effective date of April 24, 1996 in which to file his federal habeas corpus petitions. *See* 28 U.S.C. § 2254(d); *Patterson v. Stewart*, 251 F.3d 1243, 1245 (9th Cir. 2001). Thus, absent statutory or equitable tolling, Ford's federal habeas petitions would be timely only if filed prior to April 24, 1997. *See id.* at 1244 (holding that Federal Rule of Civil Procedure 6(a) applies to the calculation of AEDPA's one-year statute of limitations).

In both the Loguercio and Weed cases, Ford's initial federal habeas petitions were timely filed.

Ford signed both of his initial federal habeas petitions on April 19, 1997, five days before his one-year statute of limitations would have run. The petitions were lodged as received by the district court on April 25, 1997 and subsequently filed on May 5, 1997. According to the prisoner's mailbox rule, Ford's petitions are deemed "filed" for purposes of AEDPA's statute of limitations the moment that he delivers them to the prison authorities for forwarding to the clerk of the district court. *See, e.g., Huizar v. Carey*, 273 F.3d 1220, 1222 (9th Cir. 2001); *Saffold v. Newland*, 224 F.3d 1087, 1091 (9th Cir. 2000), *vacated on other grounds sub nom. Carey v. Saffold*, 536 U.S. 214 (2002). Because Ford signed both petitions and delivered them to the prison authorities for mailing before April 24, 1997, the petitions were timely filed.

A. The District Court's Failure to Inform Ford About its Ability To Consider his Stay Motions

Along with the habeas petitions, Ford filed motions asking the district court to stay the petitions on the exhausted claims while he returned to state court to exhaust the then-unexhausted claims. The district court correctly stated that it did not have the discretion to stay Ford's mixed petitions. *See Rose*, 455 U.S. at 509 (holding that the district court must dismiss a habeas petition containing unexhausted claims); *Calderon v. District Court (Gordon)*, 107 F.3d 756 (9th Cir. 1997) (stating that it was error for the district court to stay federal habeas proceedings in order to permit a petitioner who filed a mixed petition to exhaust his unexhausted claims in state court); *Greenawalt v. Stewart*, 105 F.3d 1268 (9th Cir. 1997) (rejecting an argument that the district court abused its discretion when it dismissed, rather than stayed, a mixed petition and holding that the district court was obligated under *Rose* to dismiss the mixed

petition).[6] However, the district court could have entertained Ford's motions for a stay had he opted to dismiss the unexhausted claims from his petitions and proceed with only the exhausted claims. In that case, the district judge could have granted the stay motions, thus permitting Ford to exhaust his then-unexhausted claims in state court. This would have advanced the court's interest in "facilitat[-ing] decision on the merits, rather than on pleadings or technicalities." *James v. Giles*, 221 F.3d 1074, 1078 (9th Cir. 2000). As we recently said in *Kelly v. Small*, "The exercise of discretion to stay the federal proceeding is particularly appropriate when an outright dismissal will render it unlikely or impossible for the petitioner to return to federal court within the one year limitation period imposed by [AEDPA]." *Kelly*, 315 F.3d at 1070; *see also Freeman v. Page*, 208 F.3d 572, 577 (7th Cir. 2000), *cert. denied*, 531 U.S. 946 (stating that outright dismissal of a mixed federal habeas petition "is not proper when that step could jeopardize the timeliness of a collateral attack"), *cert. denied*, 531 U.S. 946. When Ford returned to federal court, the district judge could then have permitted Ford to amend his originally-filed federal petitions to incorporate the newly-exhausted claims. *See, e.g., James*, 269 F.3d at 1126-27 (holding that "a district court may, in its discretion, allow a petitioner to amend a mixed petition by deleting the unexhausted claims, hold the exhausted claims in abeyance until the unexhausted claims are exhausted, and then allow the petitioner to amend the stayed petition to add the nowexhausted claims"); *Taylor*, 134 F.3d at 989 (same); *Fetterly v. Paskett*, 997 F.2d 1295, 1301-02 (9th

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6. *But see Neuschafer v. Whitley*, 860 F.2d 1470, 1472 n.1 (9th Cir. 1988) ("When a petitioner has not exhausted his state remedies before filing a federal habeas petition, a district court may hold the federal petition in abeyance, issue a stay of execution, and allow the petitioner an opportunity to exhaust his state remedies."). We subsequently stated that the *Neuschafer* footnote did not apply to cases involving mixed federal habeas petitions. *See Taylor*, 134 F.3d at 989; *see also Greenawalt*, 105 F.3d at 1274 (characterizing the footnote as dicta).

Cir. 1993) (holding that the district court has the discretion to stay a habeas corpus petition containing only exhausted claims to give the petitioner time to exhaust several newly-discovered claims in state court).

[1] In this case, however, the district court did not inform Ford, who was proceeding *pro se* at the time, about the highly technical requirement that he must first dismiss the unexhausted claims and then renew the stay motions that he attempted to make prematurely, despite our past admonition that "[t]he rights of *pro se* litigants require careful protection where highly technical requirements are involved, especially when enforcing those requirements might result in the loss of the opportunity to prosecute or defend a lawsuit on the merits." *Garaux v. Pulley*, 739 F.2d 437, 439-40 (9th Cir. 1984). We have repeatedly emphasized that a *pro se* litigant "is entitled to certain procedural protections." *James*, 269 F.3d at 1126; *see also Haines v. Kerner*, 404 U.S. 519, 529 (1972) (holding that courts must liberally construe *pro se* pleadings); *Johnson v. State of California*, 207 F.3d 650, 653 (9th Cir. 2000) (same). With respect to *pro se* pleadings, we have held that "before dismissing a *pro se* complaint the district court must provide the litigant with notice of the deficiencies in his complaint in order to ensure that the litigant uses the opportunity to amend effectively." *Ferdik v. Bonzelet*, 963 F.2d 1258, 1261 (9th Cir. 1992); *see also James*, 269 F.3d at 1126 ("This court has held that leave to amend, though within the discretion of the trial court, should be guided by the underlying purpose of Rule 15(a) of the Federal Rules of Civil Procedure, which was to facilitate decision on the merits, rather than on technicalities or pleadings."); *James*, 221 F.3d at 1077 (stating that *pro se* habeas litigants are entitled to a "statement of the grounds for dismissal and an opportunity to amend the complaint to overcome [any] deficiency unless it clearly appears from the complaint that the deficiency cannot be overcome by

amendment" (internal quotations omitted)).[7]

[2] Here, there was a procedural deficiency — the filing of mixed habeas petitions — that prevented the district court from considering Ford's stay motions. To correct that deficiency, Ford was required to amend his habeas petitions to dismiss the unexhausted claims and proceed with only the exhausted claims, and then seek a hearing on the motions to stay the exhausted claims. Given that Ford was proceeding *pro se*, the district court was obligated to inform him of his options with respect to his mixed habeas petitions: to advise him that it would have the power to consider his stay motions only if he opted to proceed with his exhausted claims and dismiss the unexhausted claims. *See Zarvela*, 254 F.3d at 382.

[3] Had Ford been properly informed of the applicable legal procedure, he in all likelihood would have chosen to amend his petitions and the district court almost certainly would have granted the stay motions. *See id.* at 380 (holding that granting a stay is "the only appropriate [remedy] where an outright dismissal 'could jeopardize the timeliness of a collateral attack'" (quoting *Freeman*, 208 F.3d at 577)); *see also Kelly*, 315 F.3d at 1070 (finding that the decision "to stay the federal proceeding is particularly appropriate when an outright dismissal will render it unlikely or impossible for the petitioner to return to federal court within the one-year limitation period imposed by [AEDPA]."). Thus, the district

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7. *See also Lucas v. Department of Corrections*, 66 F.3d 245, 248 (9th Cir. 1995) ("When the district court transforms a dismissal into a summary judgment proceeding, it must inform a plaintiff who is proceeding pro se that it is considering more than the pleadings, and must afford a reasonable opportunity to present all pertinent material [because the] notice requirement is consistent with the rule of liberal construction of pleadings presented by *pro se* litigants, particularly when dismissal is considered." (internal quotations omitted)); *cf. Wyatt v. Terhune*, 315 F.3d 1108, 1118-19 (9th Cir. 2003) (construing the Prison Litigation Reform Act's exhaustion requirement as an affirmative defense rather than a technical pleading requirement because, to hold otherwise, "would run contrary to the liberal approach we take to pleadings by *pro se* prisoners").

court, by failing to inform Ford about an option that, if taken, would have permitted the district court to grant his stay motions on the merits, deprived him of "a meaningful opportunity to amend" his pleadings. *James*, 269 F.3d at 1126. More important, the district court's failure to so inform Ford deprived him of the opportunity to exhaust his unexhausted claims and then amend the stayed petitions to incorporate the newly-exhausted claims, and thus to preserve his right to pursue all of his claims. *See Anthony*, 236 F.3d at 577 (holding that amendment of habeas petitions under Federal Rule of Civil Procedure 15(c) should be "freely given"). Our analysis is not affected by the fact that the district court has discretion to grant or deny Ford's stay requests, especially where, as here the discretion is more a matter of form than substance, and a denial of the request would likely constitute error. As the First Circuit recently recognized, "[T]here is a growing consensus that a stay is required when dismissal could jeopardize the petitioner's ability to obtain federal review." *Nowaczyk v. Warden, N.H. State Prison*, 299 F.3d 69, 79 (1st Cir. 2002); *see also Zarvela*, 254 F.3d at 380 (explaining why the district court is required to grant a stay when the failure to do so would, as here, forfeit petitioner's federal claims); *Freeman*, 208 F.3d at 577 (holding that dismissal is "not proper" if it could "jeopardize the timeliness of a collateral attack"); *James*, 269 F.3d at 1126 (holding that it is error to fail to inform a habeas petitioner about his opportunity to amend a partially-exhausted petition even though the decision to grant leave to amend is within the discretion of the trial court). Because the district court's failure to explain the procedural deficiency that precluded it from granting Ford's stay motions deprived Ford of a fair and informed opportunity to have his stay motions heard, to exhaust his unexhausted claims, and ultimately to have his claims considered on the merits, we conclude that the district court's action constituted prejudicial error.

B. The District Court's Failure to Inform Ford that he was Time-Barred Under AEDPA

[4] The district court's failure to ensure that Ford had the opportunity to make an informed choice as to whether to amend the petitions extends beyond its failure to inform him of the necessity of doing so in order to have his stay motions considered by the court. The district court further erred when it failed to inform Ford that, on the face of the complaints, he would be time-barred under AEDPA on all of his claims if he either failed to amend his petitions or chose the option of dismissing them and returning to state court to exhaust the unexhausted claims. Although Ford timely filed both of his initial federal habeas petitions, he was only timely by a few days. *See supra* Section II. Over four months then passed before the magistrate judge issued his findings and recommendations in Ford's two cases. Because AEDPA's one-year limitations period is not statutorily tolled during the pendency of a federal habeas petition, *see Duncan v. Walker*, 533 U.S. 167 (2001), the statute of limitations was still running during that four month period. Thus, when the district court gave Ford the option to dismiss his petitions and return to state court to exhaust his then-unexhausted claims, his time for filing new federal petitions had already expired by more than four months (barring an extension on the ground of equitable tolling). Predictably, when he returned to federal court after having exhausted his claims in state court, his federal petitions were dismissed as time-barred.

[5] When the district court presented Ford with the option of either dismissing his mixed petitions and returning to state court to exhaust his then-unexhausted claims or amending the petitions to proceed with only the exhausted claims, it not only failed to inform him that on the face of the complaints AEDPA's one-year statute of limitations had run on both of his petitions and that his petitions would therefore be barred from re-filing in federal court if he elected the court's first option, but

it definitively, although not intentionally, misled him by informing him that if he opted to dismiss the petitions to return to state court to exhaust his claims, the dismissal would be *without prejudice*. *See Tillema v. Long*, 253 F.3d 494, 503-04 (9th Cir. 2001) ("Because there is no statutory tolling of AEDPA's limitation period during the pendency of federal habeas petitions, the district court's erroneous dismissal of Tillema's petition would, barring some other circumstance, have literally and immediately extinguished his right to federal habeas review. In this case, therefore, it cannot accurately be said that the dismissal of Tillema's petition was, as the court's order stated, 'without prejudice.'"); *Anthony*, 236 F.3d at 573 (recognizing that "AEDPA's one-year statute of limitations . . . has rendered outright dismissal perilous to some litigants, because petitioners . . . may find themselves time-barred when they attempt to resubmit their exhausted claims to the district court"). Other circuits have also noted the deceptive nature of a dismissal without prejudice when the claims dismissed are time-barred; in *Rodriguez v. Bennett*, 303 F.3d 435 (2d Cir. 2002), for example, the Second Circuit explained that for a petitioner dismissed 'without prejudice' after a year in federal habeas proceedings, 'the 'without prejudice' provision was an illusion; petitioner could never succeed in timely refiling the petition because he would already be time-barred.' *Rodriguez*, 303 F.3d at 439. [¶] We have recognized a district court's obligation to avoid misleading petitioners. In *Valerio v. Crawford*, 306 F.3d 742 (2002), *cert. denied*, ___ S. Ct. ___ (2003), the en banc court instructed the district court to inform a petitioner when claims to be dismissed 'without prejudice' would actually be time-barred. *See Valerio*, 306 F.3d at 770-71. This simple step helps avoid the unnecessary forfeiture of petitioners' constitutional rights. Here, what the district court should have told Ford is that the dismissal, although ostensibly without prejudice, would actually result in a dismissal *with prejudice* unless he could establish that at the time of dismissal he was entitled to equitable tolling. More generally, as the

Second Circuit said in *Zarvela*, a case in which the AEDPA period had not yet run, the district court, when informing a habeas petitioner of his options with respect to a mixed petition, should "alert the petitioner to the one-year limitations period of AEDPA and to the fact that a portion of that period has already elapsed." *Zarvela*, 254 F.3d at 382. Indeed, a district court is obligated to do no less. Here, the district court's failure to alert Ford to the current status of his claim under the AEDPA one-year statute of limitations clearly deprived him of the opportunity to make a "meaningful" choice between the two options. *See Valerio*, 306 F.3d at 770-71 (finding that the district court must inform the petitioner of a potential time-bar before the petitioner chooses whether to amend his mixed petition, in order to make that choice meaningful); *James*, 269 F.3d at 1126; *Ferdik*, 963 F.2d at 1261.[8] The error was

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8. Contrary to the dissent's assertion, requiring the district judge to inform a *pro se* petitioner if, on the face of his complaint, the AEDPA one-year statute of limitations has expired during the pendency of his federal habeas petition does not transform the district judge into the petitioner's paralegal. Nor, of course, does requiring him to advise *pro se* petitioners of the existence of the AEDPA one-year limit and the fact that a portion of that period has already elapsed. We already require the district judge to inform a *pro se* habeas petitioner that he has the option of dismissing the mixed petition without prejudice and returning to state court to exhaust the then-unexhausted claims. *See e.g., James*, 269 F.3d at 1125-26. To accurately explain this option, the judge must inform the petitioner if, on the face of the complaint, the AEDPA statute of limitations has expired such that any dismissal of the mixed petition would necessarily be "with prejudice," absent equitable tolling. *See Valerio*, 306 F.3d at 770-71. To do otherwise affirmatively misleads the *pro se* petitioner about the options available to him.

Our holding today does not open the floodgates, as our dissenting colleague fears, for future requirements that district judges inform *pro se* petitioners about the many factors that could affect petitioners' decisions regarding how to proceed with mixed petitions. Notifying a *pro se* plaintiff of the existence of the AEDPA limitation and the fact that part or all of that period (whichever is the case) has already run is a relatively simple task. Judge Silverman is undoubtedly correct that a number of factors could and likely would affect a petitioner's decision regarding how to proceed. What

particularly egregious because it inevitably resulted in the subsequent dismissal of all of Ford's claims as time-barred. *See Garaux*, 739 F.2d at 439-40 (stating that the protection of a *pro se* litigant's rights is particularly important when highly technical pleading requirements "might result in the loss of the opportunity to prosecute or defend a lawsuit on the merits."). Because the district court's failure fairly or fully to explain the consequences of the options it presented to Ford deprived him of the opportunity to make a meaningful choice, and as a result subsequently caused the district court to conclude that all of his claims were time-barred, we conclude that the failure constituted prejudicial error.

C. The Effect of the District Court's Failure to Inform Ford of his Options before Dismissing his Initial Federal Habeas Petitions on the Timeliness of his Second Federal Habeas Petitions[9/]

[6] The district court's failure to inform Ford, before dismissing his initial petitions, that his claims would be time-barred under AEDPA if he chose to dismiss the petitions and return to state court, and that the district court could not

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his dissent fails to recognize, however, is that the district judge, when informing the petitioner about his options, does not ordinarily discuss (let alone affirmatively mislead the petitioner about) any of these other factors. In contrast, the judge affirmatively misleads the petitioner by stating that dismissal of a mixed petition is "without prejudice" if AEDPA's one-year statute of limitations had already expired while the federal court was considering the mixed petition. A district judge need not advise a *pro se* petitioner about every possible factor that could affect his decision, but when he does inform the *pro se* petitioner about his options, he must at the very least provide accurate, and not misleading, information.

9. The analysis in this section relates to those claims in Ford's second federal habeas petitions that were originally filed in his initial federal habeas petitions. See *infra* Section II.D. for a discussion of the claims that were asserted for the first time in Ford's second federal habeas petitions.

consider his stay motions and hold the petitions in abeyance unless he opted to proceed with his exhausted claims, necessarily affects our analysis of its decision to dismiss his second petitions, because, had the district court fairly and properly explained Ford's options to him, it is most unlikely that his second petitions would have been dismissed as time-barred. Rather, Ford would almost certainly have amended his mixed petitions by dismissing the then-unexhausted claims, moved for and undoubtedly received a stay of his exhausted claims, exhausted the then-unexhausted claims, and successfully amended the initial petitions to include the newly-exhausted claims. *See, e.g., Taylor*, 134 F.3d at 989 (describing the three-step process for amending a mixed petition, staying the exhausted claims, and re-filing an amended petition).

[7] Although we cannot place Ford back in the same position that he was in before the erroneous dismissal of his initial petitions, we can ensure that his rights are not unduly prejudiced as a result of the district court's errors. Toward that end, we hold that a *pro se* habeas petitioner who files a mixed petition that is improperly dismissed by the district court, and who then (following the district court's erroneous legal statements) returns to state court to exhaust his unexhausted claims and subsequently re-files a second petition without unreasonable delay, may employ the amendment procedures of Federal Rule of Civil Procedure 15(c) ("Rule 15(c)") to have the second petition relate back to and preserve the filing date of the improperly-dismissed initial petition.[10/] In so doing we follow the approach taken by the Second Circuit in *Zarvela*, which held under similar circumstances that "[a] *pro se* litigant should [not] lose his opportunity to present his constitutional challenge to his conviction." *Zarvela*, 254 F.3d at 382-83.

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10. Rule 15(c) provides that "[a]n amendment of a pleading relates back to the date of the original pleading when . . . the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading."

We have previously held that if a habeas petitioner's mixed petition is *properly* dismissed without prejudice and he *accepts* the proper dismissal of that mixed petition, he may not later employ Rule 15(c)'s relation back doctrine to justify an untimely-filed second petition. *See Green v. White*, 223 F.3d 1001, 1002 (9th Cir. 2000); *Van Tran v. Lindsey*, 212 F.3d 1143, 1148 (9th Cir. 2000), *cert. denied*, 531 U.S. 944, *overruled on other grounds by Locker v. Andrade*, 123 S. Ct. 1166, ___ (2003); and *Henry v. Lungren*, 164 F.3d 1240, 1241 (9th Cir. 1999). We have also held, however, that if a mixed petition is *improperly* dismissed without prejudice and the petitioner does *not accept* the improper dismissal, but elects instead to submit a second petition with only the exhausted claims, the court may treat the second petition as an amendment that relates back to and preserves the original filing date of the mixed petition under Rule 15(c), even if the AEDPA statute of limitations expired prior to the second filing. *See Anthony*, 236 F.3d at 572-74. Ford's petitions, like the petition in *Anthony* and unlike the petitions in *Green, Van Tran*, and *Henry*, were *improperly* dismissed by the district court.[11] Moreover, in Ford's case, like Anthony's and unlike in Green's, Van Tran's, and Henry's, there was no informed acceptance by the petitioner of the district court's dismissal of the mixed petitions.[12]

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11. *Compare Anthony*, 236 F.3d at 574 (holding that the district court's outright dismissal of Anthony's mixed petition without having adequately informed him of his options was "improper") *and* discussion *supra* Sections II.A. & II.B. (explaining why Ford's initial habeas petitions were improperly dismissed) *with Anthony*, 236 F.3d at 574 n.1 (stating that the dismissal of the mixed habeas petitions in *Green, Van Tran*, and *Henry* were "proper").

12. The petitioners in *Green, Van Tran* and *Henry* "accepted" the proper dismissal of their mixed petitions and indeed had no reason not to. The district court's orders dismissing the petitions without prejudice accurately stated the then-applicable law, because the dismissals occurred prior to AEDPA's effective date. *Compare* discussion *supra* Section II.A. & II.B (explaining why Ford's "acceptance" of the dismissal of his initial petitions without prejudice was not only uninformed but was based on misleading statements of the law by the district court and was therefore invalid).

Although the petition that Anthony submitted after his mixed petition was improperly dismissed contained only his exhausted claims, we see no difference for AEDPA statute of limitations purposes between Anthony's action and Ford's decision to rely on the district court's erroneous instruction and to re-submit all of his claims after exhausting the unexhausted ones in state court.[13] Thus, we hold that Ford, like Anthony, is entitled to apply Rule 15(c) to his later-filed petitions.[14]

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13. In both Ford's case and Anthony's, the second petitions were filed after the AEDPA one-year limitations period had expired. In neither case did the petitioners unreasonably delay in taking the actions that they took. Ford, after timely pursuing exhaustion in state court by filing a state habeas petition within three weeks of the federal court's dismissal of his mixed petitions, re-filed his petitions in federal court within two weeks of the state court's dismissal of his state habeas petitions. *See Zarvela*, 254 F.3d at 381 (holding that a habeas petitioner has not unreasonably delayed if he files a state habeas petition within 30 days of the federal court's dismissal of his mixed petition and if he re-files in federal court within 30 days of the state court's denial of his claims). Anthony also "proceeded with reasonable diligence." *Anthony*, 236 F.3d at 577.

14. The dissent relies principally on our decision in *Green v. White*, 223 F.3d 1001 (9th Cir. 2000), in which we held that Green's second habeas petition did not relate back to his first mixed petition after the mixed petition had been dismissed without prejudice and the petitioner had returned to state court to exhaust his then-unexhausted claims. The dissent argues that the facts in Ford's cases are exactly like those in *Green* and that *Green* therefore compels us to uphold the district court's dismissal of Ford's second petitions as time-barred. This assertion, however, ignores three critical and dispositive differences between Ford's cases and *Green*.

First, while Ford was proceeding *pro se* when he filed his first and second habeas petitions, nowhere in the *Green* opinion does it state that Green was proceeding without counsel. In fact, one of Green's contentions on appeal was that the AEDPA statute of limitations should be equitably tolled "because any delay [wa]s a result of his *and his attorney's* reliance" on Supreme Court precedent. *Green*, 223 F.3d at 1003 (emphasis added). As we emphasized *supra* Sections II.A & II.B., Ford's *pro se* status is one

One problem remains with respect to the remedy available to Ford. We cannot now return the parties to the point where the district court could decide whether to grant a stay to permit Ford to exhaust his claims. Events have overtaken us. Ford has already exhausted all of his claims. As a result, there is no purpose to be served by returning this case to the district court and requiring the district judge to rule on the stay motions. Rather, we agree with the Second Circuit that, "[b]ecause [petitioner's] initially filed petition was timely when filed and should have been stayed, subject to appropriate conditions, and because his prompt trip to and from the state courts satisfied the conditions that should have been included in a stay, the initial petition may be considered on its merits." *Zarvela*, 254 F.3d at 383. Thus, we treat Ford's initial petitions as if the district court had permitted him to dismiss the unexhausted claims and had then granted his stay motions in order to allow him to exhaust his then-unexhausted claims. Applying Rule 15(c) to

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of the principal reasons why we hold that the district judge's failure fairly and fully to inform him about his options with respect to the mixed petitions and the stay motions constitutes prejudicial error.

Second, the district judge in *Green* did not mislead Green when he informed him that he had the option of dismissing his mixed petition without prejudice in order to return to state court to exhaust his then-unexhausted claims. At the time that the district court dismissed Green's initial habeas petition without prejudice, Green still had almost 11 months remaining in his one-year AEDPA statute of limitations in which to exhaust his then-unexhausted claims.

Finally, there is no indication that Green ever filed a motion to stay the federal habeas proceedings so that he could exhaust the unexhausted claims in his initial mixed petition. Ford did file stay motions. The district court's error in failing to inform Ford that his motions could not be considered unless he opted to amend his mixed petition and dismiss his thenunexhausted claims is sufficient, standing alone, to merit relief.

Ford's current petitions, we further hold that those claims that were originally included in his initial petitions relate-back and serve to amend the improperlydismissed claims in his initial petitions. Because Ford's initial habeas petitions were filed within AEDPA's one-year statute of limitations, his amended petitions relate back to that filing date and are therefore timely with respect to the claims included in those initial petitions.[15/]

D. Claims Ford Asserts for the First Time in his Second Federal Habeas Petitions

Although we hold that those claims that were originally asserted in Ford's initial petitions and then subsequently reasserted in his second petitions were timely filed under Rule 15(c), the same analysis does not apply to the claims that Ford asserted for the first time in his second petitions. Rule 15(c)

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15. Although we need not reach the question here, Ford would also be entitled to relief under equitable tolling principles. The district court's error in failing properly and fully to inform Ford about his options with respect to the mixed petitions and in misleading him as to the legal effect of a dismissal of his petitions were "extraordinary circumstances" beyond Ford's control that would require equitable tolling of AEDPA's statute of limitations. *See, e.g., Tillema*, 253 F.3d at 504 (holding that the district court's failure to afford a federal habeas petitioner who filed a mixed petition the opportunity to abandon his sole unexhausted claim as an alternative to dismissal of his first habeas petition entitled him to equitable tolling). The Fifth Circuit recently found similar circumstances appropriate for equitable tolling in the context of a prisoner's § 1983 suit dismissed ostensibly without prejudice for failure to exhaust administrative remedies. In *Clifford v. Gibbs*, 298 F.3d 328 (5th Cir. 2002), the court recognized the impropriety of a dismissal without prejudice that actually left claims "forever precluded." *Id.* at 333. It held that claims should be equitably tolled when the "district court's dismissal . . . without prejudice actually operates as a dismissal with prejudice because [the petitioner] is barred from returning to federal court after exhausting his remedies because limitations has already run." *Id.* Ford faced the same constraints. However, because we grant Ford relief on statutory grounds, we do not resolve any equitable tolling claim here.

specifically states that the claim or defense asserted in the amended pleading must "ar[i]se out of the conduct, transaction, or occurrence *set forth or attempted to be set forth in the original pleading*" (emphasis added). In this case, there were two claims in the Loguercio case and five claims in the Weed case that Ford raised in his second petitions that he did not raise in his initial petitions.[16] Because those claims were not set forth in the original pleadings and were not "newly discovered" claims, *see Fetterly*, 997 F.2d at 1299-1301,[17] we hold that Ford may not invoke Rule 15(c) to add them to his petitions at this late stage. *See Anthony*, 236 F.3d at 576 (stating that one of the central policies of Rule 15(c) is to "ensur[e] that the non-moving party has sufficient notice of the facts and claims giving rise to the proposed amendment").[18]

With respect to the claims raised for the first time in the second Weed petition, Ford contends that AEDPA's one-year statute of limitations should be equitably tolled because he did not receive the complete set of his legal papers from his appellate attorney until July of 1997. If the statute of limitations were tolled until July of 1997, Ford's April, 1998 second

16. *See supra* notes 2 & 4 (listing the new claims).

17. With respect to the newly-asserted claim of a due process violation resulting from the use of testimony obtained from a drugged alleged coconspirator in the Weed case, Ford argues that he did not discover that the main witness against him, Jan Olgilvie, was threatened by the police and drugged until after his conviction was final. However, letters between Ford and Olgilvie demonstrate that Ford was aware of the threats and use of drugs as early as May of 1993; yet, he did not file his first federal habeas petitions until April of 1997.

18. Ford contends that all of his Weed claims — not only the claims raised for the first time in the second petition, but those asserted in the first petition as well — should be heard on the merits because he passes through the "actual innocence" gateway of *Schlup v. Delo*, 513 U.S. 298, 326-27 (1995). We reject this argument because Ford has not presented sufficient evidence to pass through that gateway.

federal habeas petition would be timely under AEDPA. In support of this equitable tolling claim, Ford submitted letters that he exchanged with his former counsel demonstrating his attempts to obtain his legal papers. The State points out, however, that, according to the correspondence, Ford's counsel first forwarded his file to him in June of 1995 and that Ford waited over two years, until after the AEDPA statute of limitations period had expired, to write his counsel stating that he did not receive a complete set of records. Ford responds by asserting that he was unsuccessfully trying to obtain the complete record from his counsel during the two year period between 1995 and 1997 — a fact that, on the record before us, is uncorroborated by independent evidence. Several courts have held that a lack of access to one's legal papers may constitute an "extraordinary circumstance" that would warrant equitable tolling in instances in which the state is responsible for the unavailability. *See, e.g., Whalem/Hunt*, 233 F.3d at 1146; *Valverde v. Stinson*, 224 F.3d 129, 134 (2d Cir. 2000) (holding that confiscation of legal papers constitutes an "extraordinary circumstance"). Although routine instances of attorney negligence do not generally constitute "extraordinary circumstances" entitling a habeas petitioner to equitable tolling, *see, e.g., Miranda v. Castro*, 292 F.3d 1063 (9th Cir. 2002), *cert. denied*, 123 S. Ct. 496 (holding that attorney miscalculation of AEDPA limitations period did not merit equitable tolling),[19] there are instances in which an attorney's

19. *See also Frye v. Hickman*, 273 F.3d 1144, 1146 (9th Cir. 2001), *cert. denied*, 535 U.S. 1055 (2002) ("[T]he miscalculation of the limitations period by . . . counsel and his negligence in general do not constitute extraordinary circumstances sufficient to warrant equitable tolling."); *Kreutzer v. Bowersox*, 231 F.3d 460, 463 (9th Cir. 2000), *cert. denied*, 534 U.S. 863 (2001) (stating that "counsel's confusion about the applicable statute of limitations does not warrant equitable tolling"); *United States v. Saro*, 252 F.3d 449, 455 (D.C. Cir. 2001), *cert. denied*, 534 U.S. 1149 (2002) (finding no extraordinary circumstances because although lawyer failed to file, petitioner did not file on his own until three months

failure to take necessary steps to protect his client's interests is so egregious and atypical that the court may deem equitable tolling appropriate, see, *e.g., Calderon v. U.S. Dist. Court (Beeler)*, 128 F.3d 1283, 1288 (9th Cir. 1997) (holding that AEDPA's statute of limitations was equitably tolled when the petitioner's counsel unexpectedly moved out of the state and left an unusable work product behind for replacement counsel), *overruled on other grounds by Calderon v. U.S. Dist. Court (Kelly)*, 163 F.3d 530, 540-41 (9th Cir. 1998) (en banc).[20/]

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later); *Harris v. Hutchinson*, 209 F.3d 325, 330 (4th Cir. 2000) (stating that counsel's mistake in interpreting a statutory provision does not constitute extraordinary circumstances); *Sandvik v. United States*, 177 F.3d 1269, 1272 (11th Cir. 1999) (stating that counsel's use of regular mail as opposed to private delivery service does not merit equitable tolling); *Taliani v. Chrans*, 189 F.3d 597, 598 (7th Cir. 1999) (stating that "normally, however, a lawyer's mistake is not a valid basis for equitable tolling").

20. *See also Fahy v. Horn*, 240 F.3d 239, 244 (3d Cir. 2001), *cert. denied*, 534 U.S. 944 (recognizing that, in a few cases, egregious conduct of counsel will merit equitable tolling); *Plowden v. Romine*, 78 F. Supp. 2d 115, 119 (E.D.N.Y. 1999) (same); *Vasquez v. Greiner*, 68 F. Supp. 2d 307, 309-11 (S.D.N.Y. 1999) (stating that equitable tolling may be available to a habeas petitioner who did not learn from his attorney that his conviction was final until after the AEDPA limitations period had expired); *Baskin v. United States*, 998 F. Supp. 188, 189-90 (D. Conn. 1998) (granting equitable tolling to a habeas petitioner because his counsel waited thirteen months to tell him that his petition for certiorari had been denied).

In a related context, there are several cases in which courts have held that egregious conduct by counsel warrants equitable tolling of the statute of limitations for filing an EEOC complaint. *See, e.g., Seitzinger v. Reading Hosp. and Med. Ctr.*, 165 F.3d 236, 239-41 (3d Cir. 1999) (stating that "[t]here are, however, narrow circumstances in which the misbehavior of an attorney may merit such equitable relief" and finding that this was such a case because counsel lied to his client when he told him that he had filed a petition); *Cantrell v. Knoxville Comm. Dev. Corp.*, 60 F.3d 1177, 1180-81 (6th Cir. 1995) (stating that this case was not "'garden variety' attorney negligence" because counsel abandoned his client due to counsel's mental illness); *Doherty v. Teamsters Pension Trust Fund*, 16 F.3d 1386, 1394 (3d Cir. 1994) (stating that, although attorney mistakes do not normally constitute extraordinary circumstances, in a case in which counsel filed a

There are no cases in this circuit determining whether an attorney's failure or refusal to provide a habeas client with important parts of his legal file may rise to the level of "extraordinary circumstances" for purposes of equitable tolling. We prefer not to decide that question here, because the factual record is insufficiently developed. As in *Whalem/Hunt*, 233 F.3d at 1148, the district court in Ford's case did not give the petitioner an opportunity to amend his petition or expand his declaration and did not hold an evidentiary hearing. Because equitable tolling issues "are highly fact-dependent, and because the district court is in a better position to develop the facts and assess their legal significance in the first instance," *id.*, we remand Ford's additional Weed claims to the district court with instructions that it develop an adequate evidentiary record before again determining whether the statute of limitations should be equitably tolled as to those claims.[21/]

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complaint in the wrong forum due to stress resulting from the death of co-worker, equitable tolling may be justified); *Burton v. U.S. Postal Serv.*, 612 F. Supp. 1057, (N.D. Ohio 1985) (holding that equitable tolling is available when an attorney abandoned his client and left town). Some courts have cited to these cases as examples of conduct by attorneys that may justify equitable tolling under AEDPA. *See, e.g., Fahy*, 240 F.3d at 244; *Plowden*, 78 F. Supp. 2d at 119.

Similarly, a number of courts, including this court, have held that a client who demonstrates gross negligence on the part of his attorney has established the requisite "extraordinary circumstances" to set aside a default judgment under Federal Rule of 60(b)(6). *See, e.g., Community Dental v. Tani*, 282 F.3d 1164, 1169 (9th Cir. 2002); *Boughner v. Secretary of Health, Educ. & Welfare*, 572 F.2d 976, 978 (3d Cir. 1978); *Shepard Claims Serv., Inc. v. William Darrah & Assocs.*, 796 F.2d 190, 195 (6th Cir. 1986); *L.P. Steuart, Inc. v. Matthews*, 329 F.2d 234, 235 (D.C. Cir. 1964).

21. With respect to the two ineffective assistance of counsel claims raised for the first time in Ford's second Loguercio petition, we affirm the district court's dismissal of the claims as time-barred. Ford has presented no reason why those two claims could not have been presented along with the others set forth in his initial petition, or why the purported absence of AEDPA materials from the library would have prevented him from filing the ineffective assistance of counsel claims but not the others. Our decision, of

III. CONCLUSION

[8] With respect to those claims that were originally raised in Ford's initial federal habeas petitions and then re-filed in his second petitions, we vacate the district court's dismissal of the second petitions as untimely and remand them so that the district court may consider the claims on the merits. With respect to the five claims that were raised initially in Ford's second Weed petition, we vacate their dismissal and remand for the development of a factual record as to whether the statute of limitations should be equitably tolled. With respect to the two ineffective assistance of counsel claims raised for the first time in Ford's second Loguercio petition, we affirm their dismissal.

AFFIRMED IN PART, VACATED IN PART, AND REMANDED WITH INSTRUCTIONS.

SILVERMAN, Circuit Judge, dissenting:

Ford filed an improper mixed petition. The district court correctly offered him the option of either amending the petition by deleting the unexhausted claims and proceeding with only those that had been exhausted, or suffering the dismissal of his entire petition without prejudice. This is exactly what a district court is supposed to do. *James v. Pliler*, 269 F.3d 1124, 1125-26 (9th Cir. 2001). When Ford did not express a choice, the district court again did exactly what it was supposed to do: It dismissed Ford's mixed petition without prejudice. *Rose v. Lundy*, 455 U.S. 509, 510 (1982); *James v. Pliler*, 269 F.3d at 1125.

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course, does not preclude the district court on remand from entertaining a motion for reconsideration of its decision should Ford make a sufficient showing as to why the ineffectiveness claims were not raised in the initial petition.

Ford never appealed the dismissal of that petition. (He still hasn't.) What he did instead was go back to state court and exhaust his remaining claims. He eventually returned to federal court and filed the new petitions that are the subject of this appeal. By that time, the statute of limitations had run and the petitions were dismissed as time-barred.

This was precisely the situation we upheld in *Green v. White*, 223 F.3d 1001 (9th Cir. 2000). Green's first, timely petition was dismissed without prejudice "apparently because Green had not exhausted his state remedies as to some claims." *Id.* at 1002. After exhausting his state remedies, Green returned to federal court. Like Ford, his claims had become time-barred. We held:

> Green obtained a voluntary dismissal of his earlier habeas petition in order to exhaust his state remedies. A second habeas petition does not relate back to a first habeas petition when the first habeas petition was dismissed for failure to exhaust state remedies. *See Van Tran v. Lindsey*, 212 F.3d 1143, 1148 (9th Cir. 2000). When the present petition was filed, there was no pending petition to which the new "petition could relate back or amend." *Henry v. Lungren*, 164 F.3d 1240, 1241 (9th Cir. 1999). Therefore, Green's present petition does not relate back to his earlier petition that was dismissed.

Id. at 1003.

Because *Green* is identical to the present case in all material respects, the majority is forced to concoct a way around it. It does so by holding that *Green* does not apply if a mixed petition was "improperly dismissed." The majority then posits that the mixed petitions in present case *were* improperly dismissed because the district court did not warn petitioner that if he re-files, the statute of limitations might return to bite him.

There are several things wrong with this. In the first place,

the facts of this case are exactly like *Green*. The district court in the present case dismissed Ford's mixed petition in the same manner as the district court in Green's case dismissed his. The majority says that Green "accepted" the dismissal without prejudice while Ford did not. This is simply untrue. After their mixed petitions were dismissed, Ford and Green did exactly the same thing — they both headed back to state court without a peep. Ford did not appeal or otherwise complain about the dismissal of his mixed petitions any more than Green did. Ford did not even mention the district judge's failure to advise about the statute of limitations in *this* appeal until after argument, when *we* sua sponte called for additional briefing about the dismissal of the original mixed petitions. It is just flat wrong to say that Green accepted the dismissal without prejudice and that Ford did not.

The majority makes much of the point that when the district court dismissed Green's petition, Green still had eleven months of the statute of limitations left to run, while Ford's time had already expired. Therefore, says the majority, the dismissal of Ford's petition without prejudice was tantamount to a dismissal with prejudice. This argument fails to take account of the fact that the district judge will almost never be able to tell, solely from the face of the petition, that the statute of limitations has expired. The calculation of the limitations deadline requires the examination of documents that rarely, if ever, accompany the petition. There is nothing to show that Ford's petition was any different than the usual.

Dismissal without prejudice was not the equivalent of a dismissal with prejudice. Ford was perfectly free to re-file. If thereafter, the statute of limitations had been raised as an affirmative defense, Ford then would have been entitled to assert whatever factual, statutory, and equitable defenses to the statute of limitations he might have had. And if the statute of limitations had not been raised, it would have been waived.

More troubling is the new rule the majority enacts today. Boldly going where no court has gone before, the majority

holds that the district court, when complying with *James v. Pliler*, must incorporate a warning about the statute of limitations. Otherwise, says the majority, the dismissal is "improper." *James v. Pliler* does not require that, nor does any other case involving a routine mixed petition.

It is one thing to construe a pro se petitioner's pleadings liberally, and to require the district court to explain its reasons for dismissing a complaint. It is quite another thing to require the district court judge to act as petitioner's legal advisor. Numerous factors can affect a petitioner's decision to delete unexhausted claims and proceed with an amended petition, rather than accept dismissal without prejudice so that unexhausted claims can be pursued in state court. For example, the meritoriousness of the unexhausted claims is an extremely important factor; so is the fact that the failure-to-exhaust might foreclose those claims forever. The availability of key witnesses is another factor. The statute of limitations is only one element in the equation, and a fact-intensive one at that. Leaving aside the question of the proper role of the court as a neutral arbiter, the district court simply is in no position to identify all of the considerations that pertain. I respectfully suggest that it is the office of the court to fairly and impartially decide the case before it, not to act as the petitioner's paralegal.

The majority places great reliance on the Second Circuit's decision in *Zarvela v. Artuz*, 254 F.3d 374 (2d Cir. 2001), but even that case does not hold that it is error to dismiss a mixed petition without prejudice unless the petitioner is informed about the statute of limitations. In *Zarvela*, the Second Circuit held that a district judge has the discretion either to dismiss a mixed petition in its entirety, or to dismiss only the unexhausted claims and then stay the petition, conditioned on petitioner's prompt exhaustion and his prompt return to federal court. *Id.* at 376-77. The district judge allowed a previously withdrawn petition to be "reopened" and therefore, Zarvela's subsequent petition could relate back to the reopened petition which was then extant. *Id.* at 377. Like *James v. Pliler*, *Zarvela* says that

a district court faced with a mixed petition should advise a petitioner that his options are either to proceed with only the exhausted claims, or to return to state court. The most that *Zarvela* says about the statute of limitations is that it might be "useful" for the district court to alert a petitioner to the AEDPA statute of limitations. *Id.* at 382. This is a far cry from what the majority holds today.

The majority's reliance on *Valerio v. Crawford*, 306 F.3d 742 (9th Cir. 2002) (en banc) is likewise misplaced. *Valerio* involved highly unusual procedural circumstances of nearly Talmudic complexity, circumstances too convoluted to recount here. But in a nutshell, this court itself created a mixed petition for the petitioner by reinstating, on appeal, new unexhausted claims that had been dismissed by the district court for abuse of the writ. In a portion of the opinion entitled, "Procedure on Remand," the court sought to bring some order to the chaos by giving the district court detailed instructions on how to proceed from that point on, including the direction to inform Valerio of a possible time-bar in the event that the district court were to decline to follow the stay-and- abeyance procedure on remand. In no way, shape or form can *Valerio* be read to require *Miranda*-like warnings about the statute of limitations in the garden variety mixed-petition case.

The majority's reliance on *Kelly v. Small*, 315 F.3d 1063 (9th Cir. 2003), is simply bizarre. The amended *Kelly* opinion was filed after the original opinion in this case (*Ford*) and relies on the original *Ford* opinion for support. *Id.* at 1070-71. Now, in its amended opinion, the majority in *this case (Ford)* relies on *Kelly*, which in turn relies on *Ford*. The wacky circularity of all of this does not change the fact that it was the *Ford* majority in *this* case that originally cooked up the rule on which the *Kelly* court relied, and with which I respectfully disagree for the reasons I've given.

Finally, in footnote 15, my colleagues advise that, "Although we need not reach the question here, Ford would also be entitled to relief under equitable tolling principles." The

majority then goes on to explain why, in its view, Ford *is* entitled to equitable tolling, and finally, in apparent recognition that the issue is not before the court, ends up by saying, "However, because we grant Ford relief on statutory grounds, we do not resolve any equitable tolling claim here." The majority's yearning to resolve Ford's supposed entitlement to equitable tolling is as puzzling as its denial that it is doing that very thing.

The essence of the majority's analysis of the equitable tolling issue it "need not reach" (but does anyway) is its view that Ford was "misled" by the district court's faithful compliance with the procedure set out in *James v. Pliler* and *Rose v. Lundy*. Equitable tolling requires that "extraordinary circumstances beyond a prisoner's control make it impossible to file a petition on time." *Miles v. Prunty*, 187 F.3d 1104, 1107 (9th Cir. 1999) (quotations omitted). There were no extraordinary circumstances here. That the district court proceeded exactly as instructed in *James v. Pliler* is not an extraordinary circumstance. I do not share the majority's view that the district court "misled" Ford by following our precedent and the Supreme Court's mandate in *Rose v. Lundy*.

Ford did not raise equitable tolling in the district court. In fact, he hasn't even raised it in this appeal, not even after we invited supplemental briefing. That alone is reason to keep our mitts off equitable tolling. *Jiminez v. Rice*, 276 F.3d 478, 481-82 (9th Cir. 2001).

Because the district court correctly dismissed the second petitions as time-barred, I would affirm, and therefore respectfully dissent.

APPENDIX B

FILED
JUL 20 1998

ENTERED
JUL 27 1998

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA -

WESTERN DIVISION

RICHARD H. FORD,	)	CV 98-2557-RAP (SH)
	)	
Petitioner,	)	REPORT AND
	)	RECOMMENDATION OF
v.	)	UNITED STATES
	)	MAGISTRATE JUDGE
S. HUBBARD, WARDEN,	)	
	)	
Respondent.	)	
	)	

This Report and Recommendation is submitted to United States District Judge Richard A. Paez pursuant to 28 U.S.C. § 636 and General Order 194 of the United States District Court for the Central District of California.

I. PROCEEDINGS

Petitioner, in state custody, filed a Petition for Writ of Habeas Corpus (the "Petition") pursuant to 28 U.S.C. §2254 on April 7, 1998. Respondent filed an Answer on April 29, 1998, followed by a Motion to Dismiss on June 17, 1998. Petitioner

filed an Opposition to respondent's Motion to Dismiss on June 17, 1998. On June 25, 1998, respondent informed this Court that it did not intend to file a Reply. The matter has been taken under submission.

II. BACKGROUND

On January 16, 1988, petitioner, a California state prison, was found guilty of conspiracy to commit first degree murder, two counts of attempted murder, attempted administration of an intoxicating agent, conspiracy to commit robbery, three counts of robbery, and three counts of assault with a firearm. (MTD at 3.) On direct appeal, petitioner's convictions were confirmed by the California Court of Appeal. (Pet. at 3.) Petitioner filed a Petition for Review to the California Supreme Court, which was denied on January 14, 1993. (Pet. at 4.) The United States Supreme Court denied certiorari on June 14, 1993. Petitioner filed no Petition for Writ of Habeas Corpus in the California courts, or any other Petitions for Review to the California Supreme Court.

On May 5, 1997, petitioner filed a Petition for Writ of Habeas Corpus (the "1997 Petition") in this Court under Case No. 97-3385-RAP (SH). On September 11, 1997, this Court dismissed the 1997 Petition without prejudice due to petitioner's failure to exhaust state remedies with respect to certain claims raised in the 1997 Petition.

On September 29, 1997, petitioner filed a petition for writ of habeas corpus in the California Supreme Court, which petition was denied on March 25, 1998. (MTD, Ex. D.)

III. DISCUSSION

In its Motion to Dismiss, respondent asserts that the instant Petition must be dismissed because it was not filed within the statutory deadline. The Magistrate Judge agrees with respondent's analysis, as shown below.

28 U.S. §2244, provides in relevant part:

(d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court.

The limitation period shall run from the latest of --

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection. (emphasis added).

Thus, Congress provided a one-year time limit for filing a habeas corpus petition in order to strengthen the policy favoring finality and comity. Calderon v. United States District Court (Beeler), 128 F.3d 1283, 1286 (9th Cir. 1997).

Petitioner's state court judgment became final on January 14, 1993, when the California Supreme Court declined to review petitioner's convictions.[1/] (M.D. Ex. B.) As held in Beeler, the one-year period of limitations did not begin to run against petitioner until April 25, 1996, the date of the enactment

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1. Alternatively, petitioner's state court judgment became final on June 14, 1993, the day the United States Supreme Court denied certiorari.

of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). Beeler, 128 F.3d at 1287. Thus, the statute of limitations began to run as to petitioner on April 24, 1996, and expired one year later on April 24, 1997. However, petitioner did not file a Petition in this Court until April 7, 1998, nearly one year beyond the one year limitation period.

This Court notes that petitioner filed a habeas petition in the California Supreme Court on September 29, 1997. However, petitioner does not receive any tolling benefit under 28 U.S.C. §2244(d)92) because he filed his habeas petition in the California Supreme Court on September 29, 1997, after the AEDPA statute of limitations had already expired. Also, the 1997 Petition filed in this Court in no way tolls the applicable statute of limitations.[2/] 28 U.S.C. §2244(d)(2) only permits a properly filed state petition for collateral review to toll the statute of limitations.

In his Opposition, petitioner maintains that, with respect to the dismissal of the 1997 Petition, he followed this Court's "recommendation" and exhausted his state remedies with respect to all unexhausted grounds set forth in the 1997 Petition. (Opp. p. 4.) However, this Court's dismissal of the 1997 Petition without prejudice in no way relieved petitioner from complying with the statutory deadline set forth in the AEDPA.[3/]

Beeler, supra, held that the one year period in which a state prisoner has to file a Petition for Writ of Habeas Corpus in the District Court constitutes a statute of limitations which may, on certain narrow circumstances, be tolled. Specifically, Beeler stated that "equitable tolling will not be available in most cases, as extensions of time will only be granted if "extraordinary

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2. The 1997 Petition was filed prematurely in this Court, as petitioner had not exhausted his state remedies with respect to certain claims. The 1997 Petition was dismissed without prejudice on September 11, 1997.

3. Moreover, petitioner concedes that the 1997 Petition was "improperly plead and prematurely submitted". (Opp. p. 3.)

circumstances beyond a prisoner's control make it impossible to file a Petition on time. [citation omitted] We have no doubt that district judges will take seriously Congress' desire to accelerate the federal habeas process, and will only authorize extensions when this high hurdle is surmounted." Beeler, 128 F.3d at 1288-89.

Petitioner concedes that the instant Petition is untimely, but argues that he "diligently attempted to move this matter forward", but was impeded by prison "lock-downs" and other constraints. (Opp. p. 2.) He also alleges that he "was not informed [of the AEDPA] until February, 1997", and that he has had difficulty in obtaining "qualified instruction and/or assistance" regarding federal habeas corpus procedure. (Id. pp. 2, 4.) However, these allegations do not constitute any "extraordinary circumstances" as envisioned by the Beeler court. See also Calderon v. United States District Court (Kelly) 127 F.3d 782 (9th Cir. 1997); United States v. Van Poyck, 980 F. Supp. 1108 (C.D.Cal. 1997).

Nor does petitioner argue that he falls within the statutory tolling provisions of §2244(d)(1)(C) or §2244(d)(1)(D). He does not assert that he is relying on a constitutional right newly recognized by the United States Supreme Court, or on a newly discovered factual predicate.

III. RECOMMENDATION

For all of the foregoing reasons, IT IS RECOMMENDED that the court issue an Order: (1) approving and adopting this Report and Recommendation; and (2) directing that Judgment be entered dismissing the action with prejudice.

DATED: 7/20/98

s/_____
STEPHEN J. HILLMAN
UNITED STATES MAGISTRATE JUDGE

FILED
JUL 22 1998

ENTERED
JUL 27 1998

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA-
WESTERN DIVISION

RICHARD H. FORD,	)	CV 98-2557-RAP (SH)
	)	
Petitioner,	)	ORDER ADOPTING
	)	REPORT AND
v.	)	RECOMMENDATION
	)	OF UNITED STATES
S. HUBBARD, WARDEN,	)	MAGISTRATE JUDGE
	)	
Respondent.	)	
	)	

Pursuant to 28 U.S.C. Section 636(b)(1)(C), the Court has reviewed the Petition, all of the records and files herein and the attached Report and Recommendation of the United States Magistrate Judge, and has made a de novo determination of the Report and Recommendation. The Court concurs with and adopts the conclusions of the Magistrate Judge.

IT IS ORDERED that the Petition filed herein is dismissed with prejudice.

IT IS FURTHER ORDERED that the Clerk shall serve copies of this Order, the Magistrate Judge's Report and Recommendation and the Judgment herein by the United States mail on petitioner and counsel for respondent.

LET JUDGMENT BE ENTERED ACCORDINGLY.

DATED: July 22 '98

s/_____
RICHARD A. PAEZ
UNITED STATES DISTRICT JUDGE

FILED
JUL 22 1998

ENTERED
JUL 27 1998

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA-
WESTERN DIVISION

RICHARD A. FORD,	)	CV 98-2557-RAP (SH)
	)	
Petitioner,	)	JUDGMENT
	)	
v.	)	
	)	
S. HUBBARD WARDEN,	)	
	)	
Respondent.	)	
	)	

Pursuant to the Order of the Court adopting the conclusions and recommendations of the United States Magistrate Judge,

IT IS ADJUDGED that the Petition for Writ of Habeas Corpus is dismissed with prejudice.

DATED: July 22, 98

s/_____
RICHARD A. PAEZ
UNITED STATES DISTRICT JUDGE

APPENDIX C

FILED
JUN 25 1998

ENTERED
JUN 30 1998

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA-
WESTERN DIVISION

RICHARD HERMAN FORD,	)	CV 98-2556-RAP (SH)
	)	
Petitioner,	)	REPORT AND
v.	)	RECOMMENDATION
	)	OF UNITED STATES
S. HUBBARD, Warden,	)	MAGISTRATE JUDGE
	)	
Respondent.	)	
	)	

This Report and Recommendation is submitted to United States District Judge Richard A. Paez, pursuant to 28 U.S.C. § 636 and the General Order 194 of the United States District Court for the Central District of California.

I. PROCEEDINGS

On April 7, 1998, petitioner filed a Petition for Writ of Habeas Corpus by a Person in State Custody (the "Petition") pursuant to 28 U.S.C. §2254. In the Petition, petitioner raises numerous grounds challenging his convictions for first degree murder for financial gain and conspiracy to commit murder. Respondent filed an Answer on April 29, 1998, followed by a Motion to Dismiss on May 11, 1998. Petitioner filed an

Opposition to respondent's Motion to Dismiss on May 27, 1998. Respondent filed a Reply on June 1, 1998. The matter has been taken under submission.

II. BACKGROUND

On October 11, 1988, petitioner was convicted in Los Angeles County Superior Court of (1) one count of first degree murder for financial gain, in violation of California Penal Code §§ 187 and 190.2(a)(1), and (2) one count of conspiracy to commit murder, in violation of California Penal Code § 182. (M.D., Ex. A.)

The California Court of Appeal affirmed petitioner's convictions on November 16, 1992. (M.D., Ex. B.) On February 11, 1993, the California Supreme Court denied review. (Pet., p. 4.) The United States Supreme Court denied certiorari on October 4, 1993. Ford v. California, 510 U.S. 838, 114 S. Ct. 118, 126 L. Ed. 2d 83 (1993).

On May 5, 1997, petitioner filed a Petition for Writ of Habeas Corpus (the "1997 Petition") in this Court under Case No. 97-3386-JMI (SH). This Court dismissed the 1997 Petition without prejudice due to petitioner's failure to exhaust state remedies with respect to certain claims raised in the 1997 Petition.

On October 24, 1997, petitioner filed a petition for writ of habeas corpus in the California Supreme Court, which petition was denied on March 25, 1998. (M.D., Ex. E.)

III. DISCUSSION

In its Motion to Dismiss, respondent asserts that the instant Petition must be dismissed because it was not filed within the statutory deadline. The Magistrate Judge agrees with the respondent's analysis, as shown below.

28 U.S.C. §2244, provides in relevant part:

(d)(1) A 1-year period of limitation shall apply to an

application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of --

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection. (Emphasis added)

Thus, Congress provided a one-year time limit for filing a habeas corpus petition in order to strengthen the policy favoring finality and comity. Calderon v. United States District Court (Beeler), 128 F.3d 1283, 1286 (9th Cir. 1997).

Respondent submits that on October 4, 1993, petitioner's judgment became final on direct review.

As held in Beeler, the one-year period of limitations did not begin to run against petitioner until April 24, 1996, the date of the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). Beeler, 128 F.3d at 1287. Thus, the statute of limitations began to run as to petitioner on April 24, 1996, and expired one year later on April 23, 1997. However, petitioner did not file the instant Petition in this Court until April 7, 1998, nearly one year beyond the one year

limitation period.

This Court notes that petitioner filed a habeas petition in the California Supreme Court on October 24, 1997. Plaintiff argues that under 28 U.S.C. § 2244(d)(2), the period of limitation was tolled until the California Supreme Court issued its judgment on March 25, 1998. However, no tolling benefit applies to petitioner because petitioner filed his habeas petition in the California Supreme Court on October 24, 1997, after the AEDPA statute of limitation had already expired.

This Court also notes that petitioner appears to be under the mistaken impression that the 1997 Petition filed in this Court somehow equitably tolled the applicable statute of limitations. (Opp., p. 3.) The 1997 Petition was dismissed without prejudice on October 8, 1997 due to petitioner's failure to exhaust his state remedies with respect to certain grounds.

In his Opposition, petitioner claims that he interpreted the Magistrate Judge's language (in the 1997 Report and Recommendation dismissing the 1997 Petition) that "[d]ismissal without prejudice is appropriate since petitioner may obtain the relief requested through a Petition for a Writ of Habeas Corpus to the California Supreme Court" as meaning that the "AEDPA's one-year limit could be equitably tolled." (See Report and Recommendation filed 9/9/97; see also Opp., p. 3.)

Petitioner's interpretation is incorrect. First of all, petitioner's filing of the 1997 Petition did not toll the AEDPA's statute of limitation. 28 U.S.C. § 2244(d)(2) provides that "State" post-conviction or other collateral review tolls the statute of limitation. See 28 U.S.C. § 2244(d)(2). The 1997 Petition was filed prematurely in this Court, as petitioner had not exhausted his state remedies with respect to certain claims.[1/]

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1. Petitioner also argues that despite the May 5, 1997 filing date of the 1997 Petition, he actually gave the 1997 Petition to prison officials on April 19, 1997, five days prior to the expiration of the statute of limitations. Petitioner's argument is irrelevant, because the claims set forth in the 1997

See Duncan v. Henry, 513 U.S. 364, 115 S. Ct. 887, 130 L. Ed. 2d 865 (1995). Second, this Court's dismissal of the 1997 Petition without prejudice in no way relieved petitioner from complying with the statutory deadline set forth in the AEDPA.

Beeler, supra, held that the one year period in which a state prisoner has to file a Petition for Writ of Habeas Corpus in the District Court constitutes a statute of limitations which may, in certain narrow circumstances, be tolled. Specifically, Beeler stated that "equitable tolling will only be granted if "extraordinary circumstances beyond a prisoner's control make it impossible to file a Petition on time. [citation omitted] We have no doubt that district judges will take seriously Congress' desire to accelerate the federal habeas process, and will only authorize extensions when this high hurdle is surmounted." Beeler, 128 F.3d at 1288-89.

Petitioner alleges that he has had difficulty in obtaining "instructions pertaining to federal habeas corpus procedure", and well as in obtaining competent legal assistance. (Opp., p. 2.) However, these allegations do not constitute any "extraordinary circumstances" as envisioned by the Beeler court. See also Calderon v. United States District Court (Kelly) 127 F.3d 782 (9th Cir. 1997); United States v. Van Poyck, 980 F.Supp. 1108 (C.D.Cal. 1997).

Nor does petitioner argue that he fails within the statutory tolling provisions of §2244(d)(1)(C) or §2244(d)(1)(D). He does not assert that he is relying on a constitutional right newly recognized by the United States Supreme Court, or on a newly discovered factual predicate.

RECOMMENDATION

For all of the foregoing reasons, IT IS RECOMMENDED that the Court issue an Order: (1) approving and adopting this

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Petition had not been exhausted at the state level, and thus the filing of the 1997 Petition in federal court was premature.

Report and Recommendation; and (2) directing that Judgment be entered dismissing the action with prejudice.

DATED: 6/25/98

s/_____
STEPHEN J. HILLMAN
UNITED STATES MAGISTRATE JUDGE

FILED
JUN 29 1998

ENTERED
JUN 30 1998

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA-
WESTERN DIVISION

RICHARD HERMAN FORD,	)	CV 98-2556-RAP (SH)
	)	
Petitioner,	)	ORDER ADOPTING
v.	)	REPORT AND
	)	RECOMMENDATION
S. HUBBARD, Warden,	)	OF UNITED STATES
	)	MAGISTRATE
Respondent.	)	JUDGE
	)	
_____	)	

Pursuant to 28 U.S.C. Section 636(b)(1)(C), the Court has reviewed the Petition, all of the records and files herein and the attached Report and Recommendation of the United States Magistrate Judge, and has made a de novo determination of the Report and Recommendation. The Court concurs with and adopts the conclusions of the Magistrate Judge.

IT IS ORDERED that the Petition filed herein is dismissed with prejudice.

IT IS FURTHER ORDERED that the Clerk shall serve copies of this Order, the Magistrate Judge's Report and Recommendation and the Judgment herein by the United States mail on petitioner and counsel for respondent.

LET JUDGMENT BE ENTERED ACCORDINGLY.

DATED: 6-29-98

s/_____
RICHARD A. PAEZ
UNITED STATES DISTRICT JUDGE

FILED
JUN 29 1998

ENTERED
JUN 30 1998

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA-
WESTERN DIVISION

RICHARD HERMAN FORD,	)	CV 98-2556-RAP (SH)
	)	
Petitioner,	)	JUDGMENT
	)	
v.	)	
S. HUBBARD, Warden,	)	
	)	
Respondent.	)	
	)	
_____	)	

Pursuant to the Order of the Court adopting the conclusions and recommendations of the United States Magistrate Judge,

IT IS ADJUDGED that the Petition for Writ of Habeas Corpus is dismissed with prejudice.

DATED: 6-29-98

s/_____
RICHARD A. PAEZ
UNITED STATES DISTRICT JUDGE

APPENDIX D

FILED
SEP- 9 1997

ENTERED
OCT 14 1997

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA-
WESTERN DIVISION

R.H. FORD,	)	CV 97-3386-RAP (SH)
	)	
Petitioner,	)	REPORT AND
	)	RECOMMENDATION OF
v.	)	UNITED STATES
	)	MAGISTRATE JUDGE
S. HUBBARD, Warden	)	
	)	
Respondent.	)	
	)	

This Report and Recommendation is submitted to United States District Judge Richard A. Paez pursuant to 28 U.S.C. § 636 and General Order 194 of the United States District Court for the Central District of California.

I. DISCUSSION

Petitioner filed the instant Petition for a Writ of Habeas Corpus on May 5, 1997. A Return was filed by respondent on June 20, 1997 alleging failure to exhaust state remedies.

After reviewing the Petition and the Return, the Magistrate Judge determined that Grounds 2, 3 and 8 through 12, inclusive, in the Petition had not been exhausted. (See OSC Re Further Proceedings ("OSC") filed August 4, 1997). Petitioner was

given the choice between dismissing the Petition without prejudice to refiling after exhaustion of the unexhausted grounds or proceeding on only the exhausted claims. If petitioner wished to waive the unexhausted claims and proceed only on the exhausted claims, he was to so notify the Court by August 22, 1997.

As of the date of this Report and Recommendation, the Court has received no indication that petitioner wishes to abandon the unexhausted claims. The Magistrate Judge informed the petitioner that if no response was received to the OSC, that it would be assumed the consented to dismissal of the Petition without prejudice.

Dismissal without prejudice is appropriate since petitioner may obtain the relief requested through a Petition for a Writ of Habeas Corpus to the California Supreme Court.

RECOMMENDATION

Based upon the foregoing, it is hereby recommended that the Court enter an Order denying the Petition and dismissing this action without prejudice.

DATED: 9-9-97

s/_____
STEPHEN J. HILLMAN
UNITED STATES MAGISTRATE JUDGE

FILED
OCT- 8 1997

ENTERED
OCT 14 1997

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA-
WESTERN DIVISION

R.H. FORD,	)	CV 97-3386-RAP (SH)
	)	
Petitioner,	)	ORDER ADOPTING
	)	REPORT AND
v.	)	RECOMMENDATION
	)	OF UNITED STATES
S. HUBBARD, WARDEN	)	MAGISTRATE JUDGE
	)	
Respondent.	)	
	)	

Pursuant to 28 U.S.C. Section 636(b)(1)(C), the Court has reviewed the Petition, all of the records and files herein and the Attached Report and Recommendation of the United States Magistrate Judge, and has made a de novo determination of the Report and Recommendation. The Court concurs with and adopts the conclusions of the Magistrate Judge.

IT IS ORDERED that the Petition filed herein is dismissed without prejudice.

IT IS FURTHER ORDERED that the Clerk shall serve copies of this Order, the Magistrate Judge's Report and Recommendation and the Judgment herein by the United States mail on Petitioner and counsel for Respondent.

LET JUDGMENT BE ENTERED ACCORDINGLY.

DATED: Oct. 8, '97

s/_____
RICHARD A. PAEZ
UNITED STATES DISTRICT JUDGE

FILED
OCT- 8 1997

ENTERED
OCT 14 1997

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA-
WESTERN DIVISION

R.H. FORD,	)	CV 97-3386-RAP (SH)
	)	
Petitioner,	)	JUDGMENT
	)	
v.	)	
	)	
S. HUBBARD, WARDEN	)	
	)	
Respondent.	)	
	)	

Pursuant to the Order of the Court adopting the conclusions and recommendations of the United States Magistrate Judge,

IT IS ADJUDGED that the Petition for Writ of Habeas Corpus is dismissed without prejudice.

DATED: Oct. 8, 97

s/_____
RICHARD A. PAEZ
UNITED STATES DISTRICT JUDGE

APPENDIX E

FILED
SEP 10 1997

ENTERED
SEPT 12 1997

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA-

WESTERN DIVISION

RICHARD HERMAN FORD,	)	CV 97-3385-RAP (SH)
	)	
Petitioner,	)	FINAL REPORT AND
v.	)	RECOMMENDATION
	)	OF UNITED STATES
S. HUBBARD, Warden, et al.,	)	MAGISTRATE JUDGE
	)	
Respondents.	)	
	)	
	)	

This final Report and Recommendation is submitted to United States District Judge Richard A. Paez pursuant to 28 U.S.C. § 636 and General Order 194 of the United States District Court for the Central District of California.

I. DISCUSSION

On May 5, 1997, petitioner, a prisoner in state custody, filed a Petition for Writ of Habeas Corpus (the "Petition") and a Motion to Stay Federal Habeas Corpus Petition Containing Exhausted Grounds While Petitioner Exhausts Unexhausted State Claims on State Appellate No. B033751 (the "Motion").

Respondent filed an Answer on June 4, 1997, and then an Amended Answer on June 12, 1997, which Amended Answer addressed the merits of petitioner's Motion.

After reviewing the Petition, the Motion and the Amended Answer, the Magistrate Judge determined that Grounds 4 and 7 (subparts 1-4), inclusive) presented in the Petition had not been exhausted. (See OSC Re Further Proceedings on a Partially Exhausted Petition filed 7/7/97 (the "OSC").) Petitioner was given the choice between dismissing the Petition without prejudice, and refiling after exhaustion of the unexhausted claims, or proceeding on only the exhausted claims. If petitioner wished to waive the unexhausted claims and proceed only on the exhausted claims, he was to so notify the Court by July 25, 1997.

Respondent filed a Return on July 15, 1997, reiterating that petitioner has failed to exhaust state remedies. This Court has reviewed the Return, and despite respondent's assertions that at least nine of petitioner's claims remain unexhausted, this Court finds that only Grounds 4 and 7 (subparts 1-4, inclusive) remain unexhausted. (See the OSC.)

On July 28, 1997, petitioner notified the Court that he desired to dismiss his Petition without prejudice so that he could exhaust the unexhausted claims. (See Petitioner's Return to Court Order Re Further Proceedings & Mot. For Extension of Time, filed 7/28/97.) Petitioner also filed a "Traverse to Return" on July 28, 1997, admitting that he has failed to exhaust several issues.

On August 5, 1997, the Magistrate Judge filed a Report and Recommendation, recommending that the Petition be dismissed without prejudice. On August 25, 1997, petitioner filed Objections to the Report and Recommendation.[1/] The

---

1. On August 25, 1997, petitioner also lodged with this Court an Amended Petition for Writ of Habeas Corpus. With respect to the claims set forth in the Amended Petition, this Court finds that Ground 4 remains unexhausted (and petitioner concedes in the Objections that Ground 4 is in fact unexhausted) and Ground 7 (sub-claim A) remains unexhausted. For the reasons stated in this Final Report and Recommendation, this Court shall order the Amended Petition returned and rejected. (See this Court's Minute Order issued concurrently herewith).

Magistrate Judge now issues this Final Report and Recommendation.

A district court has discretion to Stay proceedings on a habeas containing only exhausted claims, in order to give a petitioner time to exhaust newly discovered claims in state court before amending the federal habeas petition. Greenwalt v. Stewart, 105 F.3d 1268, 1274 (9th Cir. 1997) (per curiam), citing Fetterly v. Paskett, 997 F.2d 1295, 1301-02 (9th Cir. 1993), cert. denied, 513 U.S. 914 (1994); see also Calderon v. U.S. District Court (Gordon), 107 F.3d 756, 761 n.10 (9th Cir. 1997) (as amended per Order, April 16, 1997, 1997 WL 183877).

However, a federal habeas petition must be dismissed if it contains even one unexhausted claim. See Coleman v. Thompson, 501 U.S. 722, 731, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991); Castile v. Peoples, 489 U.S. 346, 349, 109 S.Ct. 1056, 103 L.Ed.2d 380 (1989); Rose v. Lundy, 455 U.S. 509, 522, 102 S.Ct. 1198, 71 L.Ed.2d 379 (1982).

The instant Petition contains both unexhausted and exhausted claims. Therefore, this Court does not have the discretion to Stay such a Petition, and dismissal of the instant Petition is required.

Dismissal without prejudice is appropriate since petitioner may obtain the relief requested through a Petition for Writ of Habeas Corpus to the California Supreme Court.[2/]

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2. In his Objections, petitioner maintains that he submitted a "Notice and Motion for Leave to Proceed-Relief from Default" to the California Supreme Court on August 1, 1997, requesting leave from such Court to submit a second Petition for Review. The California Supreme Court denied his request. However, petitioner is not foreclosed from presenting a Petition for Writ of Habeas Corpus to the California Supreme Court.

Petitioner's request for an extension of time to respond to the Return is denied at this time. At such time as petitioner filed a new Petition with this Court containing only issues that have been fully exhausted, petitioner shall be given an appropriate amount of time to respond to respondent's Return addressing the merits of the new Petition.

II. RECOMMENDATION

Based upon the foregoing, it is hereby recommended that the Court enter an Order denying the Petition and dismissing the action without prejudice.

DATED: 9-10-97

s/_____
STEPHEN J. HILLMAN
UNITED STATES MAGISTRATE JUDGE

NOTICE

Reports and Recommendations are not appealable to the Court of Appeals, but may be subject to the right of any party to file Objections as provided in the Local Rules Governing the Duties of the Magistrate Judges and review by the District Judge whose initials appear in the docket number. No Notice of Appeal pursuant to the Federal Rules of Appellate Procedure should be filed until entry of the Judgment of the District Court.

FILED
SEP 11 1997

ENTERED
SEP 12 1997

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA-

WESTERN DIVISION

RICHARD HERMAN FORD,	)	CV 97-3385-RAP (SH)
	)	
Petitioner,	)	ORDER ADOPTING
v.	)	FINAL REPORT AND
	)	RECOMMENDATION
S. HUBBARD, Warden, et al.,	)	OF UNITED STATES
	)	MAGISTRATE JUDGE
Respondents.	)	
	)	
	)	

Pursuant to 28 U.S.C. Section 636(b)(1)(C), the Court has reviewed the Petition, all of the records and files herein and the attached Final Report and Recommendation of the United States Magistrate Judge, and has made a de novo determination of the Final Report and Recommendation. The Court concurs with and adopts the conclusions of the Magistrate Judge.

IT IS ORDERED that the Petition filed herein is dismissed without prejudice.

IT IS FURTHER ORDERED that the Clerk shall serve copies of this Order, the Magistrate Judge's Final Report and Recommendation and the Judgment herein by the United States mail on Petitioner and counsel for Respondent.

LET JUDGMENT BE ENTERED ACCORDINGLY.

DATED: Sept. 11, 97

s/_____
RICHARD A. PAEZ
UNITED STATES DISTRICT JUDGE

FILED
SEP 11 1997

ENTERED
SEP 12 1997

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA-

WESTERN DIVISION

RICHARD HERMAN FORD,	)	CV 97-3385-RAP (SH)
	)	
Petitioner,	)	JUDGMENT
v.	)	
	)	
S. HUBBARD, Warden, et al.,	)	
	)	
Respondents.	)	
	)	
	)	

Pursuant to the Order of the Court adopting the conclusions and recommendations of the United States Magistrate Judge,

IT IS ADJUDGED that the Petition for Writ of Habeas Corpus is dismissed without prejudice.

DATED: Sept. 11, 97

s/_____
RICHARD A. PAEZ
UNITED STATES DISTRICT JUDGE

No. 03-221

IN THE SUPREME COURT OF THE UNITED STATES

CHERYL K. PLILER, Warden of California State Prison - Sacramento
Petitioner,

vs.

RICHARD HERMAN FORD, *Respondent*

OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

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OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

Respondent Richard Herman Ford respectfully opposes the petition for a Writ of Certiorari filed by Cheryl K. Pliler, Warden of California State Prison – Sacramento and the Attorney General for the State of California (collectively, "the Petitioner").

CONSTITUTIONAL PROVISIONS INVOLVED [1]

STATEMENT OF THE CASE

On January 16, 1988, a jury convicted Richard Herman Ford and Anthony Von Villas in California Superior Court of conspiracy to commit first degree murder, two counts of attempted murder, robbery, conspiracy to commit robbery, three counts of robbery and three counts of assault with a firearm. Ford was also convicted of attempted administration of an intoxicating agent. (The "Loguercio case.") The trial court sentenced Ford to prison for thirty-six years to life. Ford appealed to the California Court of Appeal, which affirmed his conviction and sentence (*People v. Von Villas* (1992) 10 Cal.App.4th 201, 274-275.) The California Supreme Court denied review on January 14, 1993. A Petition for Writ of Certiorari was denied by

[1] Ford adopts the "Opinion or Judgment Below", "Statement of Jurisdiction" and "Relevant Statutory Provisions" sections set forth in the Petitioner's Opening Petition.

this Court on June 14, 1993. (*Ford v. California*, 508 U.S. 975 (1993).) (App. B-2.)

On October 11, 1988, in a separate trial, Ford and Von Villas were found guilty of first-degree murder and conspiracy to commit murder. (The "Weed case.") The trial court sentenced Mr. Ford to life without the possibility of parole. Ford appealed to the California Court of Appeal, which affirmed his conviction and sentence. (See *People v. Von Villas* (1992) 11 Cal.App.4th 175; AER 33.) The California Supreme Court denied review on February 11, 1993. A Petition for Writ of Certiorari was denied by this Court on October 4, 1993. (*Ford v. California*, 510 U.S. 838 (1993).) (App. C-2.)

On April 19, 1997, several days prior to the expiration of AEDPA's limitations period, Ford filed in the United States District Court for the Central District of California, two pro se federal habeas corpus petitions with motions to stay the petitions containing exhausted grounds while he exhausted the then-unexhausted state claims. (App. B-2, C-2.)

In the respective cases, the magistrate judge issued an order which gave Ford the choice of either (1) dismissing the petition without prejudice and re-filing after exhaustion of the unexhausted claims or (2) dismissing the unexhausted claims and proceeding with only the exhausted claims. The

magistrate judge issued an order, however, in which he stated that the district court did not have the discretion to stay a mixed petition so that the motion to stay the proceedings was denied. Additionally, the order stated that Ford was to notify the court within approximately two and one-half weeks if he wanted to waive the unexhausted claims and proceed only on the exhausted claims. (App. D1-D2, E2-E4.)

Ford opted to have the respective petitions dismissed in order to exhaust his unexhausted claims. (App D2-D5, E2.) As a result, on August 5, 1997 in the Loguercio case, and on September 9, 1997, in the Weed case, the magistrate judge issued reports recommending that the district court dismiss Ford's respective habeas petition without prejudice because they were partially exhausted petitions under *Rose v. Lundy*, 455 U.S. 509, 522 (1982). (App. D2-D5, E7.) However, the district court did not inform Ford that the AEDPA one-year statute of limitations had expired during the pendency of his federal habeas petitions so that, if he chose to dismiss his federal petitions and returned to state court to exhaust all of his claims he would be time-barred when he attempted to re-file his federal claims. On September 11, 1997 (Loguercio) and October 14, 1997, (Weed), the district court adopted the magistrate's report and dismissed the petitions, purportedly without prejudice, albeit after the expiration of the AEDPA's

limitations period. (See Petition for Writ of Certiorari, hereafter "Pet." at p. 5; App. D2-D5, E7.)

On September 29, 1997 (Loguercio) and October 24, 1997, (Weed), Ford filed, pro se, respective habeas corpus petitions in the California Supreme Court challenging his respective state court convictions. On March 25, 1998, the California Supreme Court summarily denied review. Having exhausted his state remedies, Ford then returned to federal court on April 7, 1998 and filed, second pro se federal habeas corpus petitions challenging his respective convictions. (App. B1-B8, C1-C9.)

The state contended that the second petitions were time-barred under the AEDPA's one-year statute of limitations and moved to dismiss the respective petitions. The magistrate judge issued reports recommending that Ford's petitions be dismissed with prejudice as untimely under AEDPA. On July 22, 1998 (Loguercio) and on June 30, 1998 (Weed) the district court judge adopted the magistrate judge's reports and dismissed the respective petitions as time-barred. (*Ibid.*)

Ford filed a notice of appeal and applied for a certificate of appealability ("COA"). The district court denied that request, but the Ninth Circuit consolidated Ford's two cases, the Weed case and the Loguercio case, and granted his request for a COA on the question whether his federal

habeas petitions were timely under AEDPA's one-year statute of limitations, 18 U.S.C. §2254(d). (App. A21.)

On September 6, 1992, the Ninth Circuit filed an opinion in which it affirmed in part, vacated in part, and remanded with instructions. (App. A40.) In consideration of the authorities which recognize that the rights of pro se prisoner litigants require careful protection when highly technical requirements are involved, especially when enforcing those requirement might result in the loss of the opportunity to procedure to defend a lawsuit on the merits, the court held that before dismissing a pro se complaint, the district court was obliged to advise Ford of his options with respect to his mixed habeas petitions: to advise him that it would have the power to consider his stay motions only if he opted to proceed with his exhausted claims and dismiss the unexhausted claims. The district court's failure to explain the procedural deficiency that precluded it from granting Ford's stay motions deprived Ford of a fair and informed opportunity to have his stay motions heard, to exhaust his unexhausted claims, and ultimately to have his claims considered on the merits. Thus, the district court's action constituted prejudicial error. (App. A4-A5.)

The district court further erred when it failed to inform Ford that, on the face of the complaints, he would be time-barred under AEDPA on all of

his claims if he either failed to amend his petitions or chose the option of dismissing them and returning to state court to exhaust the unexhausted claims. When the district court gave Ford the option to dismiss his petitions and return to state court to exhaust his then-unexhausted claims, his time for filing new federal petitions had already expired by more than four months. As a result, the district court misled Ford by informing him that if he opted to dismiss the petitions to return to state court to exhaust his claims, the dismissal would be without prejudice. The court held that a district court, when informing a habeas petitioner of his options with respect to a petition containing both exhausted and unexhausted state claims, should alert the petitioner to the one-year limitations period of the Antiterrorism and Effective Death Penalty Act (AEDPA) and to the fact that a portion of that period has already elapsed. In this case, the district court's failure to alert Ford to the current status of his claim under the AEDPA one-year statute of limitations deprived him of the opportunity to make a meaningful choice between the two options, and inevitably resulted in the subsequent dismissal of all of Ford's claims as time-barred. As such, the district court's failure to fairly or fully explain the consequences of the options it presented to Ford constituted prejudicial error. (App. A5.)

The court also held that if the district court had fairly and properly explained Ford's options to him, it would have been unlikely that his second

petitions would have been dismissed as time-barred. In order to ensure that Ford's rights were not unduly prejudiced as a result of the district court's errors it held that a pro se habeas petitioner who files a mixed petition that is improperly dismissed by the district court, and who then, following the district court's erroneously legal statements, returns to state court to exhaust his unexhausted claims and subsequently re-files a second petition without unreasonably delay, may employ the amendment procedures of Federal Rule of Civil Procedure 15 to have the second petition relate back to and preserve the filing date of the improperly dismissed initial petition. Thus, the order dismissing the claims that were originally raised in Ford's initial federal habeas petitions and then re-filed in his second petitions as untimely had to be vacated and remanded to the district court for consideration on the merits. (App. A5-A6.)

Judge Silverman dissented, writing that requiring the district court to incorporate a warning about the statute of limitations when informing habeas petitioner of his options with respect to a mixed petition was tantamount to requiring the district judge to improperly act as the petitioner's legal advisor. (App. A6.)

The majority and dissenting options were amended on May 15, 2002. (App. A7-A13.) With the amendments, the panel voted to deny the

Warden's petition for panel rehearing and the suggestion for rehearing en banc. (App. A-13.)

The Ninth Circuit denied the Warden's petition for rehearing and the suggestion for rehearing en banc. (App. A13.) The matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc reconsideration. (Fed. R. App. P. 35; App. A13.)

On May 28, 2003, the Warden's motion to stay the issuance of the mandate in the Ninth Circuit pending its decision to file for a writ of certiorari was granted.

REASONS FOR DENYING THE WARDEN'S PETITION

I. THE MAJORITY'S DECISION DOES NOT PRESENT ANY ISSUE WORTHY OF REVIEW BY THIS COURT.

A. The Rights Advisements Adopted By The Majority Are Consistent With The Responsibilities That Attend A Federal Court's Assumption Of Jurisdiction Over A Habeas Petition Filed By A Pro Se Prisoner Litigant.

Although the Petitioner concedes Ford was entitled to delete the unexhausted claims from his petition rather than suffer a dismissal, it contends he was *not* entitled to be apprised of his options with respect to his mixed habeas petitions, or to be warned about the AEDPA's limitation period before the mixed petition was dismissed. (Petition at p. 8, App. A15, A25.) Such warnings it vigorously argues, would "institutionalize[] a stay and abeyance procedure of dubious merit," impose[] new and onerous burdens on district courts in connection with the dismissal of mixed habeas petitions and [would] clash[] with the holdings of other federal appellate courts. (Pet. at p. 8.) None of these contentions has merit.

The "exhaustion" doctrine has long been one of the pillars of federal habeas corpus jurisprudence. (*See, e.g., United States ex rel. Kennedy v.*

Tyler, 269 U.S. 13, 17-19 (1925); *Ex Parte Royall*, 117 U.S. 241, 251 (1886).) Under the present- day codification of that doctrine, habeas relief is not available "unless it appears that the applicant has exhausted the remedies available in the courts of the State . . . ." (28 U.S.C. §2254(b)(1)(A).) In *Rose v. Lundy*, *supra*, 455 U.S. 509, this Court addressed the proper method for disposing of habeas petitions containing both exhausted and unexhausted claims. The Court adopted a rule of "total exhaustion" and directed that "a district court must dismiss such 'mixed petitions,' leaving the prisoner with the choice of returning to state court to exhaust his claims or of amending or resubmitting the habeas petition to present only exhausted claims to the district court." (*Id.* at 510.)

Consonant with *Rose*, the district court afforded Ford two options: *first,* it allowed Ford to dismiss the petition without prejudice and to re-file the petition after exhaustion of the unexhausted claims or *second*, to amend his mixed petition to delete the unexhausted claims. However, as explained by the majority, simply apprising Ford of the option to amend without also apprising him it would have the power to consider his stay motions only if he opted to proceed with his exhausted claims and dismiss the unexhausted claims, and to the fact that a portion of the one-year limitations period of

AEDPA had already elapsed, deprived him of the opportunity to make a "meaningful" choice between the two options. (App. A29.)[2]

The "unique handicaps of incarceration" (*Jacobsen v. Filler*, 790 F.2d 1362, 1364, n. 4 (9th Cir. 1986) faced by pro se prisoner litigants have long been recognized by the courts. (*Hudson v. Hardy*, 412 F.2d 1091, 1094-1095 (D.C. Cir. 1968).) The realities of incarceration include that prisoners are not at liberty to seek out representation, they are limited in their ability to seek out evidence and information they need in order to litigate, they are restricted in their access to legal materials and their "confinement makes compliance with procedural deadlines difficult." (*Rand v. Rowland*, 154 F.3d 952, 958 (9th Cir. 1998).) "Unskilled in law, unaided by counsel, and unable to leave the prison" incarcerated pro se litigants have little control over litigation. (*Houston v. Lack*, 487 U.S. 266, 271 (1988).)

It is for these reasons this Court has held that pro se litigants are entitled to certain procedural protections. Pro se pleadings are held to less

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2 Paraphrasing the dissent, the Petitioner asserts that since Ford did not opt to have both petitions dismissed without prejudice before returning to state court to exhaust his remaining claims, the district court complied with the dictates of *Rose*: it "did exactly what it was supposed to do: . . . dismiss Ford's mixed petition[s] without prejudice." (Pet. at p. 10; App. A-40.) While Mr. Ford may not have *expressed* a choice, he certainly *exercised* one; he allowed his petitions to be dismissed without prejudice. As the majority recognized, the fact he failed to verbalize his choice elevates form over substance; the gravamen of the error here is that he did so out of ignorance. (App. A25-26, 27-28.)

stringent standards than those prepared by counsel (*Haines v. Kerner*, 404 U.S. 519, 520-521 (1972) (per curiam); *Boag v. MacDougall*, 454 U.S. 364, 365 (1982) (per curiam); *Hughes v. Rowe*, 449 U.S. 5, 9-10 (1980) (per curiam); *Johnson v. State of California*, 207 F.3d 650, 653 (9th Cir. 2000); *Noll v. Carlson*, 809 F.2d 1446, 1448 (9th Cir.1987); App. A24). With respect to pro se pleadings, courts have held that before dismissing a pro se complaint the district court must provide the litigant with notice of the deficiencies in his complaint in order to ensure that the litigant uses the opportunity to amend effectively, (*Noll v. Carlson, supra*, 809 F.2d at 1448-1449; *James v. Pliler*, 221 F.3d 1074, 1077 (9th Cir. 2000)) and an opportunity to correct them unless amendment would be futile. (*Eldridge v. Block*, 832 F.2d 1132, 1136 (9th Cir. 1987).) In a context less fraught with obscure procedural perils than habeas corpus, an incarcerated pro se litigant must be given fair notice of the ramifications of summary judgment and the requirements for opposing it. (*Sawyer v. American Federation of Government Employees, AFL CIO*, 180 F.3d 31, 34 (2d Cir.1999); *Rand v. Rowland*, supra, 154 F.3d at 958.)

The court adopted the fair notice/summary judgment rule in *Rand* because it recognized that summary judgment concepts and principles can be difficult, that the consequence of summary judgment is "drastic," and that incarcerated pro se litigants suffer unique hardships of incarceration. (*Id.* at

pp. 956-959.) "We believe that the twin infirmities of imprisonment and proceeding without counsel, which provided the basis for the creation of the fair notice rule, remain solid grounds for the rule's retention and its restriction to this class of litigants." (*Id.* at p. 958.)

This rule takes on a special urgency in the habeas review context. Under AEDPA, state prisoners have only one year from the date their convictions become final to file a petition for federal habeas review. (28 U.S.C. §2244(d)(1)(A).) As the majority recognized, to dismiss a petition without explaining the procedural deficiency would be contrary to and inconsistent with the protections accorded pro se litigants in view of the statute of limitations and complex procedural requirements of the Antiterrorism and Effective Death Penalty Act of 1996 under prevailing decisional law. (App. A24; *James v. Pliler, supra*, 269 F.3d at 1126.)

Under the Petitioner's approach, a prisoner's opportunity to amend a §2254 petition would thus depend on his awareness of the existence of that alternative or on a sympathetic district judge who informs him of the option and permits the amendment. (See Fed.Rule Civ.Proc.§15(a).) Not only would this result in inconsistent access to the courts, it would be contrary to the imperatives that attend a district court with respect to pro se litigants.

B. The Procedure Adopted By The Court Does Not Promote The Improper Goal Of Stay And Abeyance.

Indifferent to the fact Ford was uninformed (Pet. at p. 9), the Petitioner argues at length that the advisement required by the Court "promotes the improper goal of stay and abeyance," undermines the policy of comity underlying the exhaustion doctrine, and will lead to piecemeal habeas litigation. (Pet. at pp. 9-10.) As to these contentions, there also is no merit.

Nothing in the procedure approved by the court "circumvents the AEDPA's limitations period". (See Pet. at p. 10.) Although the Court's pre-AEDPA decision in *Rose v. Lundy, supra*, 455 U.S. at 522, prescribed the dismissal of federal habeas corpus petitions containing unexhausted claims, petitioner offers no reason and none exists why a district court should not retain jurisdiction over a meritorious claim and stay further proceedings pending the complete exhaustion of state remedies. Certainly, there is every reason to do so when AEDPA gives a district court the alternative of simply denying a petition containing unexhausted but nonmeritorious claims, see 28 U.S.C. §2254(b)(2), particularly in an instance such as this where the failure to retain jurisdiction would foreclose federal review of a meritorious claim because of the lapse of AEDPA's 1-year limitations period. Indeed, this

Court has concluded that in such circumstances a stay is preferable, *see Duncan v. Walker,* 533 U.S. 167, 183 (2001) (Stevens, J., with whom Souter, J., joins, concurring in part and in the judgment) ["[T]here is no reason why a district court should not retain jurisdiction over a meritorious claim and stay further proceedings pending the complete exhaustion of state remedies."], and, as the majority in the present case concluded is the only appropriate course in cases like Ford's where an outright dismissal could jeopardize the timeliness of a collateral attack.

This is not a matter of pyrrhic concern. A Justice Department study cited by this Court indicates that 63% of all habeas petitions are dismissed, and 57% of those are dismissed for failure to exhaust state remedies. (See U.S. Dept. of Justice, Office of Justice Programs, Bureau of Justice Statistics, Federal Habeas Corpus Review: Challenging State Court Criminal Convictions 17 (1995), cited in *Duncan v. Walker, supra*, 533 U.S. at p. 184, Breyer, J., with whom Ginsberg, J., joins, dissenting). And it can take courts a significant amount of time to dispose of even those petitions that are not addressed on the merits; on the average, district courts took 268 days to dismiss petitions on procedural grounds. (*Id.,* at 186, [of all habeas petitions, nearly half were pending in the district court for six months or longer; 10% were pending more than two years.].) Because there is no statutory tolling of AEDPA's limitations period during the pendency of

federal habeas petitions (*Tillema v. Long*, 253 F.3d 494, 503-504 (9th Cir. 2001)), a large group of federal habeas petitioners, seeking to return to federal court after subsequent state-court rejection of an unexhausted claim, can find their claims time barred. Moreover, because district courts vary substantially in the time they take to rule on habeas petitions, two identically situated prisoners can also receive opposite results. If Prisoner *A* and Prisoner *B* file mixed petitions in different district courts six months before the federal limitations period expires, and the court takes three months to dismiss Prisoner *A*'s petition, but seven months to dismiss Prisoner *B*'s petition, Prisoner *A* will be able to return to federal court after exhausting state remedies, but Prisoner *B*--due to no fault of his own--may not. (*Duncan v. Walker, supra,* 533 U.S. at p. 186, Breyer, J., with whom Ginsberg, J., joins, dissenting.)

In addition, despite the Petitioner's suggestion that a stay of exhausted claims pending the complete exhaustion of state remedies would undermine the "purposes" of AEDPA, nothing precludes a federal court from staying exhausted claims pending exhaustion of state remedies as a matter of equity. In a concurring opinion in *Duncan,* Justice Stevens wrote that "neither the Court's narrow holding, nor anything in the text or legislative history of AEDPA, precludes a federal court from deeming the limitations period

tolled . . . as a matter of equity." (*Duncan v. Walker, supra*, 533 U.S. at 183 (Stevens, J., concurring).)

The question whether a claim has been exhausted can often be a difficult one, not just for prisoners unschooled in the immense complexities of federal habeas corpus law, see *post,* at 2134 (Breyer, J., dissenting), but also for district courts, see, *e.g., Morgan v. Bennett*, 204 F.3d 360, 369-371 (9th Cir. 2000) [disagreeing with District Court's conclusion that claim had not been exhausted]; *Bear v. Boone*, 173 F.3d 782, 784-785 (10th Cir.1999) [same].) Justice Stevens indicated that in his view, equitable considerations may make it appropriate to "conclude that Congress simply overlooked the class of petitioners whose timely filed habeas petitions remain pending in district court past the limitations period, only to be dismissed after the court belatedly realizes that one or more claims have not been exhausted." (*Id.* at p. 184 (Stevens, J., concurring).) Thus, a federal court is free to conclude that a stay is appropriate for petitioners who invoke the court's jurisdiction within the 1-year interval prescribed by AEDPA but files a mixed petition. As a result, equitable considerations make it appropriate for federal courts to stay exhausted claims in a federal habeas petition, pending state exhaustion.

Moreover, contrary to the Petitioner's contention, permitting a pro se prisoner litigant to present the initially unexhausted (but now exhausted)

claims is also consistent with the decisions of the circuit courts. Indeed, there is a "growing consensus that a stay is required when dismissal could jeopardize the petitioner's ability to obtain federal review." (*Nowaczyk v. Warden, N.H. State Prison*, 299 F.3d 69, 79 (1st Cir.2002); and see *Zarvela v. Artuz*, 254 F.3d 374, 380-383 (2d Cir.2001) cert. denied, 534 U.S. 1015 (2001)] [holding that "[a]lthough a district court would generally have discretion whether to stay the exhausted claims of a mixed petition or dismiss the entire petition, outright dismissal was not appropriate for Zarvela because, with so little time remaining on his statutory one-year limitations period, a complete dismissal 'jeopardize[d] the timeliness of a collateral attack.' "] quoting *Freeman v. Page*, 208 F.3d 572, 577 (7th Cir.2000)) cert. denied, 531 U.S. 946 (2000); *Newell v. Hanks*, 283 F.3d 827, 834-35 (7th Cir.2002) (same)] and see *Kelly v. Small*, 315 F.3d 1063, 1070 (9th Cir. 2003); *Brambles v. Duncan*, 330 F.3d 1197, 1203 (9th Cir.2003); *Palmer v. Carlton*, 276 F.3d 777, 781 (6th Cir. 2002); *Hasan v. Galaza*, 254 F.3d 1150, 1152 n.2 (9th Cir. 2001); *Burris v. Farley*, 51 F.3d 655, 658-59 (7th Cir.1995); *Thompson v. Wainwright*, 714 F.2d 1495, 1498 (11th Cir.1983)).

C. The Majority's Decision Comports With AEDPA's Purpose To Further The Principles Of Comity, Finality, And Federalism.

Nor does the majority's approach undermine considerations of comity. (Pet. at pp. 10-11.) The exhaustion requirement "is principally designed to protect the state courts' role in the enforcement of federal law and prevent disruption of state judicial proceedings." (*Rose v. Lundy, supra*, 455 U.S. at 518.) The exhaustion rule promotes comity in that " 'it would be unseemly in our dual system of government for a federal district court to upset a state court conviction without an opportunity to the state courts to correct a constitutional violation.' " (*Ibid.* quoting *Darr v. Burford*, 339 U.S. 200, 204 (1950); see also *O'Sullivan v. Boerckel*, 526 U.S. 838, 844 (1999) ["Comity thus dictates that when a prisoner alleges that his continued confinement for a state court conviction violates federal law, the state courts should have the first opportunity to review this claim and provide any necessary relief"].) Since principles of comity and judicial economy mandate dismissal of any *unexhausted* claims, (*see Rose v. Lundy, supra*, 455 U.S. at pp. 518-520), contrary to the Petitioner's contention, those principles are not applicable to Ford's exhausted claims, since the state courts already had an opportunity to consider those issues raised in his mixed federal petition.

Further, there is a strong preference for a stay under these circumstances. As the Second Circuit explained in *Zarvela v. Artuz, supra,* 254 F.3d at 382-383, "[s]taying the exhausted claims would be a traditional way to 'defer' to another court 'until' that court has had an opportunity to exercise its jurisdiction over a habeas petitioner's unexhausted claims." (*Id.;* see also *Duncan v. Walker, supra*, 533 U.S. at 182-183 (Stevens, J., with whom Souter, J., joins, concurring in part and in the judgment); see also *Nowaczyk v. Warden, N.H. State Prison, supra*, 299 F.3d at p. 79.)

Because the claims presented in Ford's §2254 petition were fully exhausted and properly before the district court, and dismissal would have jeopardized Ford's ability to obtain federal review, dismissal was "inconsistent with the imperative that underscores all habeas corpus proceedings: ensuring that federal constitutional claims may be reviewed promptly in a federal forum if State remedies have been exhausted." (See *Braden v. 30th Judicial Cir. Ct.*, 410 U.S. 484, 490 (1973) [explaining that the exhaustion doctrine reflects "a careful balance between important interests of federalism and the need to preserve the writ of habeas corpus as a swift and imperative remedy in all cases of illegal restraint or confinement"] (internal quotation marks omitted)).

Under the majority's construction, a stay advances the policy of comity underlying the exhaustion doctrine by facilitating state review on the merits of the unexhausted claims, thus giving those courts the opportunity to review all claims of constitutional error. (*Coleman v. Thompson*, 501 U.S. 722, 731 (1991) ["This exhaustion requirement is . . . grounded in principles of comity; in a federal system, the States should have the first opportunity to address and correct alleged violations of [a] state prisoner's federal rights."].) Thus, contrary to the Petitioner's argument, the majority's view counsels in favor of, not against the principles of comity discussed in *Rose* by "defer[ring] to the state court action" as to unexhausted claims.

D. Contrary To The Petitioner's Contention, The Majority's Decision Avoids Piecemeal Litigation And Facilitates Decision On The Merits.

Another federal interest mentioned by the Petitioner is the avoidance of piecemeal litigation and encouraging a prisoner to bring all challenges to his state-court conviction in one §2254 proceeding, lest it "prolong the litigation unduly and thus delay the execution of judgment." (Pet. at p. 11; *Galtieri v. Wainwright*, 582 F.2d 348, 369 (5th Cir. 1978) (en banc) (dissenting opinion); *In re Blodgett*, 502 U.S. 236, 239 (1992).)

Even if it could be said that the Petitioner's view accurately reflects reality, as discussed above, "nothing bars a district court from retaining jurisdiction pending complete exhaustion of state remedies" (*Duncan v. Walker, supra*, 533 U.S. at 182 (Souter, J., concurring) see also *id.* at 182-183 (Stevens, J., concurring).) It is doubtful that Congress intended to give state prisoners less than a full year (plus the duration of state collateral proceedings) to file a federal habeas corpus petition or perhaps erase the right altogether, and "den[ying] the petitioner the protections of the Great Writ entirely," (*Lonchar v. Thomas*, 517 U.S. 314, 324 (1996)) simply because the technical nature of the habeas rules led to the filing of a mixed petition. The majority's decision thus comports with "AEDPA's purpose to further the principles of comity, finality, and federalism." (See *Williams v. Taylor*, 529 U.S. 420, 436 (2000).) Specifically, it promotes the exhaustion of state remedies while respecting the interest in the finality of state court judgments.

Further, subsequent petitions that meet the "abuse of the writ" standard have always been subject to dismissal, irrespective of the Court's treatment of mixed petitions. (See *Calderon v. United States District Court* (Taylor), 134 F.3d 981, 988-989 (9th Cir.) [amendment of petition to add newly-exhausted claims entails risk that new claims could be barred as an abuse of the writ], cert. denied, 525 U.S. 920 (1998); and see 28 U.S.C.

§2244(b)(2)(A) [requiring a "new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court"]; §2244(b)(2)(B) [requiring new evidence establishing that, "but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense"].) A rule which would preclude a district court from retaining jurisdiction pending complete exhaustion, therefore provides no additional incentive whatsoever to consolidate all grounds for relief in one §2254 petition. In contrast, the resultant loss to a pro se prisoner of the ability to litigate a timely filed habeas petition pending in district court would be severe and irremediable.

> "The uniqueness of habeas corpus in the procedural armory of our law cannot be too often emphasized. It differs from all other remedies in that it is available to bring into question the legality of a person's restraint and to require justification for such detention. Of course this does not mean that prison doors may readily be opened. It does mean that explanation may be exacted why they should remain closed. It is not the boasting of empty rhetoric that has treated the writ of habeas corpus as the basic safeguard of freedom in the Anglo-American world. 'The great writ of *habeas corpus* has been for centuries esteemed the best and only sufficient defence of personal freedom.' [(]Mr. Chief Justice Chase, writing for the Court, in *Ex parte Yerger*, 8 Wall. 85, 95, 19 L.Ed. 332.[)] Its history and function in our legal system and the unavailability of the writ in totalitarian societies are naturally enough regarded as one of the decisively differentiating factors between our democracy and totalitarian governments." ." *Brown v. Allen*, 344 U.S. 443, 512, 73 S.Ct. 397, 448, 97 L.Ed. 469 (opinion of Frankfurter, J.)

(*Rose v. Lundy, supra*, 102. S.Ct. at p. 1218, fn. 16 (opinion of Stevens, J. dissenting).)

In the words of Justice Stevens in *Rose v. Lundy, supra*, 102 S. Ct. at pp. 1119-1120, the "total exhaustion" rule advocated by the Petitioner demeans the high office of the great writ.

> "Perhaps a rule of this kind would be an appropriate response to a flood of litigation requesting review of minor disputes. An assumption that most of these petitions are groundless might be thought to justify technical pleading requirements that would provide a mechanism for reducing the sheer number of cases in which the merits must be considered. But the Court's experience has taught us not only that most of these petitions lack merit, ***but also that there are cases in which serious injustice must be corrected by the issuance of the writ***. In such cases, the statutory requirement that adequate state remedies be exhausted must, of course, be honored. When a person's liberty is at stake, however, there surely is no justification for the creation of needless procedural hurdles."

(Emphasis and italics added.)

With only slight adjustments for the specific nature of the issue here, Justice Steven's statement is on point. Instead of deterring the sophisticated habeas petitioner who understands, and wishes to circumvent, the rules of exhaustion, the result advocated by the Petitioner will serve to trap the unwary *pro se* prisoner who is not knowledgeable about the intricacies of the exhaustion doctrine and whose only aim is to secure a new trial or release from prison. No doubt he will consolidate all conceivable grounds for relief in an attempt to accelerate review and minimize costs. But, under the Petitioner's approach, if he unwittingly includes in a §2254 motion a claim not yet presented to the state courts, he risks dismissal of the entire petition

with the resultant forfeiture of federal habeas review. Adopting a procedure which permits the district court to stay exhausted claims while exhausting his state court remedies fulfills the purposes of the writ. The decision of the majority does not conflict with but instead effectuates the mandate of this Court by insuring a petitioner proceeding pro se does not lose the opportunity to have *all* of his claims heard on the merits.

E. The Ninth Circuit's Decision In This Case Does Not Conflict With Precedent From Other Circuits.

In its attempt to manufacture an intercircuit dispute, the Petitioner contends the majority's decision conflicts with the decisions of at least two other circuit courts of appeals, *Victor v. Hopkins*, 90 F.3d 276 (9th Cir. 1996), and *Sterling v. Scott*, 57 F.3d at 451, 453 (5th Cir. 1995).) The Petitioner does not and can not to explain how they are inconsistent, as examination proves no such conflict exists.

In *Rose*, this Court ruled that a habeas court can not proceed to adjudicate a mixed petition. In *Victor* the Eighth Circuit held, consonant with *Rose*, that district courts lack authority to hold mixed petitions in abeyance (*id.* at 282), and in *Scott*, with citations to *Rose*, the Fifth Circuit upheld the district court's dismissal of a mixed habeas petition in a capital case. Similarly, the majority in *Ford*, explicitly recognized that a district

court must dismiss a habeas petition containing unexhausted claims. (Opn. A-22.) As the majority's decision has nothing to do with the discretion of a district court to hold in abeyance a *mixed* habeas petition pending exhaustion of state remedies, the Petitioner has not and cannot demonstrate any inconsistency with *Victor* or *Sterling* sufficient to warrant issuance of a writ of certiorari. (Pet. at pp. 11-12.)

Nor is it true, as the Petitioner contends, that no court other than *Ford* has ever held a district court must advise a habeas petition that his federal claims may be time-barred absent equitable tolling. (Pet. at p. 13.) The Second Circuit held in *Zarvela*, a case in which the AEDPA period had not yet run, the district court when informing a habeas petitioner of his options with respect to a mixed petition must "alert the petitioner to the one-year limitations period of AEDPA and to the fact that a portion of that period has already elapsed. (*Zarvela v. Artuz, supra*, 254 F.3d at 382.) In *Valerio v. Crawford*, 306 F.3d 742, 771 (9th Cir.2002), an en banc panel of the Ninth Circuit held that when dismissal could jeopardize claims potentially barred by AEDPA's statute of limitations, the district court is obliged to notify the petitioner in order to guarantee the fully informed exercise of his rights. (*Ibid.*; see also, *Kelly v. Small, supra*, 315 F.3d at 1070 [same].) Similarly, in *Brambles v. Duncan, supra*, 330 F.3d 1197, the Ninth Circuit found it was error to dismiss a mixed petition where the district court failed to inform the

pro se Brambles that the dismissal of his first petition, although ostensibly without prejudice, would effectively be with prejudice unless he could establish that the limitations period was equitably tolled. (*Id.* at p. 1202-1203; see also *Smith v. Ratelle*, 323 F.3d 813, 820-824 (9th Cir.2003) [finding equitable tolling warranted where district court dismissed prior timely mixed petition without providing opportunity to delete unexhausted claims and gave misleading information that failed to inform petitioner that any new petition would be untimely].)

Nor is the majority's decision inconsistent with *Warren v. Garvin*, 219 F.3d 111 (2nd Cir.), cert. denied, 121 S. Ct. 404 (2000), as the Petitioner contends. In *Warren* the Second Circuit held that if the district court errs in its dismissal of a mixed petition, relief under Rule 60(b), of the Federal Rules of Civil Procedure is not available where the petitioner fails to act with the requisite diligence in pursuing his claims in state court and returning to federal court following voluntarily dismissal of his petition. (*Id.* at 113-114.) Since the petitioner in *Warren* did not timely pursue his state remedies, the court properly declined to apply the provisions of Rule 60(b) to petitioner's previously filed habeas corpus application.

Warren stands for nothing more than the general rule of diligence. "[T]he relevant measure of diligence is how quickly a petitioner sought to

exhaust the claims dismissed as unexhausted, and how quickly he returned to federal court after doing so." (*Guillory v. Roe*, 329 F.3d 1015, 1018 n. 1 (9th Cir. 2003) [indicating thirty days is sufficient time to return to state court, and thirty days is sufficient time to return to federal court after state court action final); see also *Smith v. Ratelle*, *supra*, 323 F.3d at pp. 815, 819 [ninety-three days assumed [but not decided] to be reasonably diligent]; *Warren v. Garvin*, *supra*, 219 F.3d at pp. 114-115.) In reliance on *Warren*, the Second Circuit in *Zarvela* provided a stay only where "entry to the state courts and return [to federal court] occurred promptly." (*Zarvela v. Artuz*, *supra*, 254 F.3d at pp. 382-383; see, e.g., *Devino v. Duncan*, 215 F.Supp.2d 414, 418 (S.D.N.Y.2002).) *Ford*, in turn, cited *Zarvela* for the propositon that the return from federal court after a state collateral challenge must be prompt in order to satisfy the conditions of a stay. (App. A34; *Zarvela v. Artuz, supra*, 254 F.3d at p. 383.) The majority's decision thus merely affirms that which is axiomatic under *Warren*, that state remedies must be expeditiously pursued where the pro se petitioner is seeking to satisfy conditions pursuant to a stay (App. A34; *Zarvela v. Artuz, supra*, 254 F.3d at 383; *Guillory v. Roe, supra*, 329 F.3d at 1018), or, as in the case of *Warren*, seeks to re-open a previously dismissed petition pursuant to Federal Rule of Civil Procedure, Rule 60(b)(6). (*Warren v. Garvin, supra*, 219 F.3d at 114-

115.) Hence, the Petitioner can show no inconsistency to warrant a writ of certiorari.

F. The Majority's Opinion Does Not Impose New And Unwarranted Burdens On The District Courts.

According to the Petitioner, the decision reached by the majority constitutes an unwarranted expansion of existing decisional law. By requiring district courts to inform habeas petitions that their federal claims may be time-barred "if [they] opt[ ] to dismiss the petitions 'without prejudice' and return to state court to exhaust all of their claims, it contends that the majority has visited burdens of unparalleled complexity upon the district court. Not only would the district court be required to dispense correct legal advise regarding the applicability of the statute of limitations, it complains, it also would be required to calculate the limitations deadline, a task which likely would require resort to documents which rarely accompany the petition in order to calculate the limitations period. (Pet. at p. 13; App. A42.)

In its apparent zeal to establish error worthy of certiorari, the Petitioner has grossly mischaracterized the holding reached by the majority. The majority merely requires the district judge to notify a pro se plaintiff of the existence of the AEDPA limitation and the fact part or all of the period,

whichever is the case, has already run, a relatively simple task. (App. A28-30, fn. 8; and see *Brambles v. Duncan*, *supra*, 330 F.3d at pp. 1199-1200.) "This simple step helps avoid the unnecessary forfeiture of petitioners' constitutional rights." (App. A-28.)

Other circuits have noted the deceptive nature of a dismissal without prejudice when the claims dismissed are time-barred, and require similar advisements. (*Rodriguez v. Bennett*, 303 F.3d 435 (2nd. Cir.2002).) In *Rodriguez*, the Second Circuit explained that for a petitioner dismissed 'without prejudice' after a year in federal habeas proceedings, the 'without prejudice' provision was an illusion; petitioner could never succeed in timely re-filing the petition because he would already be time-barred.' (*Id.* at p. 439.) In *Valerio v. Crawford*, *supra*, 306 F.3d 742, the en banc court instructed the district court to inform a petitioner when claims to be dismissed 'without prejudice' would actually be time-barred. In *Zarvela*, a case in which the AEDPA period had not yet run, the Second Circuit held that a district court, when informing a habeas petitioner of his options with respect to a mixed petition should "alert the petitioner to the one-year limitations period of AEDPA and to the fact that a portion of that period has already elapsed. (*Zarvela, v. Artuz, supra*, 254 F.3d at p. 382; App. A28-29.) Here, the failure to alert Ford to the current status of his claim under the AEDPA one-year statute of limitations clearly deprived him of the

opportunity to make a "meaningful" choice between the two options. (*Valerio v. Crawford, supra*, 306 F.3d at pp. 770-771.)

While Judge Silverman opined a myriad of factors could and likely would affect a petitioner's decision regarding how to proceed, (see Pet. at p. 13, App. A43 (Silverman, J., dissenting)), the majority's decision does not require a district judge to advise a pro se petitioner how to proceed. Nor does it require a district court judge to advise a pro se petitioner about every possible factor that could affect his decision or require the district judge to calculate the limitations period. It also does not turn the district court into the petitioner's paralegal or "blurs the distinction between impartial decision-making and advocacy." (Pet. at p. 13.) It merely requires the district court to inform a pro se habeas petitioner of the existence of the AEDPA one-year limit and the fact that a portion of that period has already lapsed; a relatively simple task. (App A-29, fn. 8.) Given the important legal interests at stake, this is hardly sisyphean, let alone burdensome.

As even the most seasoned of lawyers knows, AEDPA is a confusing, at times impenetrable statute. It imposes stringent procedural rules on habeas petitioners, with often harsh results. To alleviate the burden on pro se litigants, the Ninth Circuit has followed the Second and Third Circuits in requiring district courts to provide mandatory prophylactic "notice"

measures to advise pro se petitioners of the consequences of certain AEDPA procedural provisions that may foreclose consideration of their claims on the merits. (*See Adams v. United States*, 155 F.3d 582, 584 (2nd Cir.1998) (per curiam) [mandatory warning regarding consequences of "second or successive petition" rule when recharacterizing motions under §2255]; *United States v. Miller*, 197 F.3d 644, 646, 652 (3d Cir.1999) (same), *Mason v. Meyers*, 208 F.3d 414, 418 (3d Cir.2000) (same, under §2254).) The Ninth Circuit already requires the district judge to inform a pro se habeas petitioner that he has the option of dismissing the mixed petition without prejudice and returning to state court to exhaust the then-unexhausted claims. (*James v. Pliler*, 269 F.3d 1124, 1125-1126 (9th Cir. 2001).) The decision reached by the majority does nothing more than insure that those options are accurately explained: that the district court judge must inform the petitioner if, on the face of the complaint, the AEDPA statute of limitations has expired such that any dismissal of the mixed petition would necessarily be "with prejudice," absent equitable tolling. (App. A29, fn. 8.) Anything less, would affirmatively mislead the pro se petitioner about the options available to him. (*Ibid.*) That however, might be precisely the Petitioner's objective.

Under the Petitioner's approach, if a pro se prisoner litigant unwittingly includes in a §2254 motion a claim not yet presented to the state

courts, he risks dismissal of the entire petition without being apprised of his available options. A prisoner's opportunity to amend a §2254 petition would thus depend on his awareness of technical requirements or run the risk of outright dismissal, which would render it unlikely or impossible to pursue a timely collateral attack. The decision of the majority simply prevents the state from exploiting a *pro se* prisoner who is not knowledgeable about the intricacies of the exhaustion doctrine and whose only aim is to secure a new trial or release from prison through federal review by requiring compliance with certain minimal safeguards. Under the circumstances, it is difficult to see what all the fuss is about.

II. THE NINTH CIRCUITS INTERPRETATION OF FEDERAL RULE OF CIVIL PROCEDURE 15(c) IS NOT CONTRARY TO LAW.

Based on a tortured interpretation of existing precedent, the Petitioner now contends certiorari should be granted because the majority's interpretation of the "relation back doctrine" is contrary to rule 15(c) of the Federal Rules of Civil Procedure, circumvents the AEDPA's one-year limitations period, and is inconsistent with decisions of at least six other circuit courts of appeals. None of these contentions has merit.

The Petitioner insists that Rule 15(c) cannot apply to habeas corpus cases in light of AEDPA, because allowing relation back of otherwise time-

barred claims is inconsistent with the legislative intent that the rules would have very limited application to habeas corpus proceedings and to Rule 15(c) in particular. (Pet. At p. 16.)

Prior to the advent of AEDPA, dismissal without prejudice to the filing of a new, exhausted petition caused no detriment to the petitioner, because there was no time limitation on the filing of a federal habeas petition. AEDPA's one-year statute of limitations, however, has rendered outright dismissal perilous to some litigants, because petitioners such as Ford may find themselves time-barred when they attempt to resubmit their claims to the district court. (See *Anthony v. Cambra*, 236 F.3d 568, 573 (9th Cir.2000).)

There is no question that Rule 15(a) applies to habeas corpus actions with the same force that it applies to garden-variety civil cases. 28 U.S.C. §2242 states that applications for habeas corpus "may be amended or supplemented as provided in the rules of procedure applicable to civil actions." Similarly, Rule 11 of the Rules Governing Section 2254 Cases in the United States District Courts states that "[t]he Federal Rules of Civil Procedure, to the extent that they are not inconsistent with these rules, may be applied, when appropriate, to the petitions filed under these rules." The Petitioner has cited to no authority that supports the proposition that AEDPA

renders Rule 15 inapplicable to federal habeas corpus proceedings, and there is substantial authority to the contrary. (See e.g. *Withrow v. Williams*, 507 U.S. 680, 696 n. 7 (1993); *Calderon v. Ashmus*, 523 U.S. 740, 750 (1998) (Breyer, J., concurring) [under Habeas Rule 11, and unless otherwise expressly governed by statute, habeas corpus amendments are governed by Rule 15]; *United States v. Thomas*, 221 F.3d 430, 436 (3d Cir.2000) [holding that Rule 15(c) applies to post-AEDPA §2255 petitions]; *Mederos v. United States*, 218 F.3d 1252, 1254 (11th Cir.2000) [applying Rule 15(c) to post-AEDPA habeas petition and holding that amended pleading related back to original timely pleading].) As held in *Anthony v. Cambra, supra*, 236 F.3d at p. 576, there is no inconsistency between AEDPA's statute of limitations and Rule 15(c)'s amendment regime where, as here, the state is on notice of the claims to be raised; as explained by a leading treatise: Moore, "[t]he rationale of allowing an amendment to relate back is that once a party is notified of litigation involving a specific factual occurrence, the party has received all the notice and protection that the statute of limitation requires." (James Wm. Moore et al., Moore's Federal Practice §15.19[1] (3d ed.1999).)

Nor is this case at all inconsistent with *Green v. White*, 223 F.3d 1001, 1003 (9th Cir.2000), as the Petitioner contends. (Pet at p. 17.) There, the court held that a second habeas petition does not relate back to a first habeas

petition when the first habeas petition was dismissed for failure to exhaust state remedies (*see also, e.g., Dils v. Small*, 260 F.3d 984, 986 (9th Cir.2001); *Van Tran v. Lindsey*, 212 F.3d 1143, 1148 (9th Cir.), cert. denied, 531 U.S. 944 (2000); *Henry v. Lungren*, 164 F.3d 1240, 1241 (9th Cir.) [holding that when a second habeas petition is filed following the dismissal without prejudice of a prior habeas petition for failure to exhaust, there is no pending petition to which the new petition "could relate back or amend")], cert. denied, 528 U.S. 963 (1999).)

However, what the Petitioner fails to mention, and was undeniably central to the majority's holding that *Green* was distinguishable, was the fact that in *Anthony v. Cambra, supra*, 236 F.3d 568, the Ninth Circuit carved out an exception to its earlier holdings, in instances where the district court has dismissed an earlier "mixed" petition without affording habeas litigants with the opportunity to amend their mixed petitions by striking their unexhausted claims . . ." (App. A-32, and see fn. 11-12; *id.* at 574; see also *Freeman v. Page*, 208 F.3d 572, 577 (7th Cir.2000) [dismissal of mixed federal petition "is not proper when that step could jeopardize the timeliness of a collateral attack"]; *Henry v. Lungren, supra*, 164 F.3d at p. 1241, [an untimely petition may "relate back" to an earlier petition under Fed.R.Civ.P. 15(c)(2) where a district court impliedly retains jurisdiction].) Thus, this case is easily distinguishable from the Ninth Circuit's decision in *Green v.*

White, supra, 223 F.3d 1001, which precluded employment of Federal Rule of Civil Procedure, Rule 15(c) to treat a later petition as "relating back" to the filing date of an earlier petition which had been ***properly*** dismissed..

Moreover, other circuits have held that a habeas application filed after a previous application was dismissed for non-exhaustion is a "continuation" of the earlier application. (See *In re Gasery*, 116 F.3d 1051, 1052 (5th Cir.1997) (per curiam); *Graham v. Johnson*, 168 F.3d 762, 775-781 (5th Cir. 1999).) Thus, the Petitioner is incorrect when it states that no court other than *Ford* has held that an untimely habeas petition can relate back to a prior habeas petition that has been dismissed. (Pet. at p. 17.)

The Petitioner contends that a number of other circuits have addressed the specific relation-back issue presented here, namely, whether the relation back doctrine applies to a former habeas proceeding. These circuits have held that Rule 15(c) does not apply where the party bringing suit did not seek to "amend" his original pleading, but, rather, allowed the first petition to be dismissed and then later opted to file a new petition at a subsequent date. (*Neverson v. Bissonnette*, 261 F.3d 120, 126 (1st Cir. 2001); *Marsh v. Soares*, 223 F.3d 1217, 1219 (10th Cir.2000) [holding "relation back" doctrine inapplicable when initial habeas petition had been dismissed because there was no pleading to which the new petition could relate back];

Warren v. Garvin, 219 F.3d 111, 114 (2d Cir.2000) [same]; petition containing an entirely new claim does not relate back to the original filing date; and see *Newell v. Hanks*, *supra*, 283 F.3d at 834; *Nyland v. Moore*, 216 F.3d 1264, 1266 (11th Cir.2000); *Jones v. Morton*, 195 F.3d 153, 160-161 (3d Cir.1999).)

As the holding in this case concerns whether a pro se prisoner litigant could employ the relation-back doctrine to have the second petition relate back to and preserve filing date of the ***improperly***-dismissed initial petition, the above-cited cases which concerned an entirely different question concerning the amendment procedures of Federal Rule of Civil Procedure 15(c) are not at all applicable. As this Court has stated in the past, cases are not authority, of course, for issues not raised and resolved. (*Landgraf v. USI Film Products*, 511 U.S. 244, 265 (1984) ["the 'maxim not to be disregarded that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used' "]; *R. A. V. v. St. Paul*, 505 U.S. 377, 386, fn. 5 (1992) [it is "contrary to all traditions of our jurisprudence to consider the law on this point conclusively resolved by broad language in cases where the issue was not presented or even envisioned"]; *United States v. Stanley*, 483 U.S. 669, 680 (1987) ["no holding can be broader than the facts before the court"]; *Adams v. Texas*, 448 U.S. 38, 45, fn. 3 (1980) [issue of applicability of *Witherspoon v.*

Illinois, 391 U.S. 510, 519 (1968) to Texas death qualification process not foreclosed by that decision "because the issue was not explicitly raised in that case."]) As the present issue was not discussed or raised in any of the cases cited by the Petitioner, the Petitioner cannot demonstrate any conflict among the circuits to justify review.

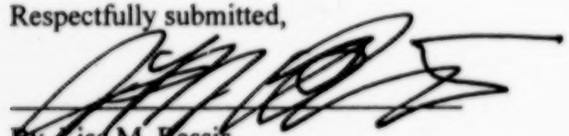
The majority's decision was expressly animated by concerns for protecting the ability of a pro se petitioner to present the constitutional challenges to his conviction. (App A31, citing *Zarvela v. Artuz*, 254 F.3d 374, 382-383 "[a] pro se litigant should [not] lose his opportunity to present his constitutional challenge to his conviction.") The majority's decision is thus consistent with existing decisional law.

In sum, the Ninth Circuit's decision is wholly consistent with this Court's precedent. Faced with this well-established precedent, the Petitioner simply seizes out-of-context cases in an attempt to create issues where none exist. This Court should see through this transparent attempt to establish an inter-circuit disparity and deny the petition.

CONCLUSION

Contrary to the State's assertions, the Ninth Circuit's opinion in *Ford v. Hubbard* neither conflicts with the law of other circuits, nor the precedental opinions of this court. Accordingly, Ford respectfully requests this Court to deny the Warden's Petition in its entirety.

Respectfully submitted,



By Lisa M. Bassis,
Attorney for Respondent
Richard Herman Ford

PROOF OF SERVICE

STATE OF CALIFORNIA COUNTY OF LOS ANGELES

I am employed in the county of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is P.O. Box 691956, Los Angeles, California, 90069.

On November 14, 2003, I served the foregoing document described as Opposition To The Petition For A Writ Of Certiorari on the interested persons and parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed described as follows:

Clerk, Supreme Court of the United States
1 First Street NE
Washington, D.C. 20543

Solicitor General of the United States, Room 5614, Department of Justice, 950 Pennsylvania Ave., N.W., Washington, DC 20530-0001

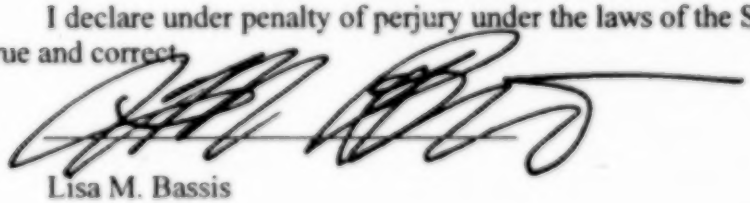
Bill Lockyer
Attorney General for the State of California
300 South Spring St.
Los Angeles, Ca. 90013

Richard Ford, E010539
CSP SAC A 3-223
P.O. Box 290066
Repressa Ca. 95671-0066

(BY MAIL) I caused such envelope as indicated on the attached service list with postage thereon fully pre-paid to be placed in the United States mail at Los Angeles, California.

Executed on November 14, 2003, at Los Angeles, California.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.



Lisa M. Bassis

(3)

No. 03-221

Supreme Court, U.S.
FILED
NOV 24 2003
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

CHERYL K. PLILER, Warden of California State Prison - Sacramento, *Petitioner,*

v.

RICHARD HERMAN FORD, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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9 pp

IN THE SUPREME COURT OF THE UNITED STATES

No. 03-221

CHERYL K. PLILER, Warden of California State Prison - Sacramento, *Petitioner,*

v.

RICHARD HERMAN FORD, *Respondent.*

Cheryl K. Pliler, Warden of California State Prison – Sacramento, at Represa, California (hereafter the Warden), respectfully submits this reply to respondent Richard Herman Ford's opposition to the petition for writ of certiorari (referred to hereafter as the Opposition). In her petition, the Warden seeks review on two questions: (1) whether the dismissal of a "mixed" habeas petition is improper unless the district court informs the petitioner about the possibility of a stay of the proceeding pending exhaustion of state remedies and advises the petitioner with respect to the statute of limitations in the event of any refiling; and (2) whether a second, untimely habeas petition may "relate back" to a first habeas petition, where the first habeas petition was dismissed and the first proceeding is no longer pending.

A. Consistency and Conflict Between the Circuits

This Court has unequivocally and repeatedly held that "a district court *must* dismiss habeas petitions containing both unexhausted and exhausted claims." *Rose v. Lundy*, 455 U.S. 509, 522 (1981) (emphasis added); *see also Coleman v. Thompson*, 501 U.S. 722, 731 (1991); *Castille v. Peoples*, 489 U.S. 346, 349 (1989); *Teague v. Lane*, 489 U.S. 288, 325 (1989) (Stevens, J., concurring); *Engle v. Isaac*, 456 U.S. 107, 124 n.25 (1982). It is undisputed that the two federal petitions submitted

by Ford for filing on April 19, 1997 (collectively referred to hereafter as the First Petitions) were unexhausted. As the dissent in this case observes:

> Ford filed . . . improper mixed [first] petitions. The district court correctly offered him the option of either amending the petition[s] by deleting the unexhausted claims and proceeding with only those that had been exhausted, or suffering the dismissal of his entire petition[s] without prejudice. This is exactly what a district court is supposed to do. *James v. Pliler*, 269 F.3d 1124, 1125-26 (9th Cir. 2001). When Ford did not express a choice, the district court again did exactly what it was supposed to do: It dismissed Ford's mixed [first] petition[s] without prejudice. *Rose v. Lundy*, 455 U.S. [at 510]; *James v. Pliler*, 269 F.3d at 1125.

App. A40 (Silverman, J., dissenting).

Ford nevertheless maintains in his Opposition that the "rights advisements adopted by the majority are consistent with the responsibilities that attend a federal court's assumption of jurisdiction over a habeas petition filed by a pro se prisoner litigant." Opp'n at 10. Not so. *No* court (other than *Ford*) has *ever* held that a mixed habeas petition may *not* be dismissed under *Rose v. Lundy*, unless the district court informs the petitioner about the possibility of a stay of the proceeding pending exhaustion of state remedies, and advises the petitioner that if the court dismisses the petition the one-year limitation period of the Antiterrorism and Effective Death Penalty Act of 1996 (referred to hereafter as the AEDPA) may bar any future federal claims. *See* App. A42-43 (Silverman, J., dissenting) ("Boldly going where no court has gone before . . . .").

The majority in effect *requires* district courts to entertain mixed habeas petitions where the newly-announced advisements were not provided; dismissal under such circumstances, according to the majority, constitutes "prejudicial error." App. A15. As set forth in the Warden's

petition, the majority's holding in that regard conflicts with the decisions of at least three other circuit courts of appeals. *See, e.g.*, *Warren v. Garvin*, 219 F.3d 111, 114-15 (2d Cir. 2000) ("[A]ppellant knew of the 1-year limitations period for habeas petitions under the AEDPA, and his failure to timely refile (or to pursue his additional state claims) is merely garden variety neglect"); *Victor v. Hopkins*, 90 F.3d 276, 282 (8th Cir. 1996) ("We conclude that any suggestion in our prior cases that a district court has broad discretion to hold in abeyance a habeas petition including both exhausted and unexhausted claims pending exhaustion of state remedies is contrary to the Supreme Court's explicit directions in *Rose v. Lundy*"); *Sterling v. Scott*, 57 F.3d 451, 454 (5th Cir. 1995) ("The district court must also dismiss a mixed petition, such as Sterling's petition, containing both exhausted and unexhausted claims").

Most recently, in *Akins v. Kenney*, 341 F.3d 681 (8th Cir. 2003), the Eighth Circuit addressed a habeas petitioner's claim that the district court should have stayed his mixed petition while he exhausted his newly-presented claims, in part because the AEDPA's one-year period of limitation had lapsed while his petition was pending in federal court. *Id.* at 685. As the court noted in reviewing the claim, "absent a stay or equitable tolling, Akins will be unable to return to federal court following exhaustion of his state court remedies." *Ibid.* The court nevertheless rejected the petitioner's contention, and held:

> Several circuits have concluded that a stay is required or is reasonable in cases of mixed habeas petitions where a dismissal would "jeopardize the petitioner's ability to obtain federal review" in light of AEDPA's one-year statute of limitation. *Nowaczyk* [*v. Warden, New Hampshire State Prison*], 299 F.3d [69,] . . . 79 [(1st Cir. 2002)]; *see also Brambles v. Duncan*, 330 F.3d 1197, 1203 (9th Cir. 2003); *Palmer v. Carlton*, 276 F.3d 777, 781 (6th Cir. 2002); *Zarvela v. Artuz*, 254 F.3d 374, 380 (2d Cir. 2001), *cert. denied*, 534 U.S. 1015 . . . (2001); *Freeman v. Page*, 208 F.3d 572, 577 (7th Cir. 2000),

cert. denied, 531 U.S. 946 (2000).[1/] Justice Stevens stated in his concurring opinion in *Duncan* [*v. Walker*, 533 U.S. 167] that "although the Court's pre-AEDPA decision in *Rose v. Lundy* prescribed the dismissal of federal habeas corpus petitions containing unexhausted claims, in our post-AEDPA world there is no reason why a district court should not retain jurisdiction over a meritorious claim and stay further proceedings pending the complete exhaustion of state remedies." *Duncan*, 533 U.S. at 182-83 . . . (Stevens, J., concurring in part and concurring in the judgment) (citation omitted).

While this view may be the "growing consensus," *Nowaczyk*, 299 F.3d at 79, it has not yet been adopted by a majority of the members of the Supreme Court or by this circuit. Absent contrary controlling Supreme Court authority, we are bound to follow our own precedents and the Supreme Court's view as expressed in *Rose v. Lundy*. We have held, post-AEDPA, that "a district court has no authority to hold a habeas petition containing unexhausted claims in abeyance absent truly exceptional circumstances, such as when state remedies are inadequate or fail to afford a full and fair adjudication of federal claims, or when exhaustion in state court would be futile." *Carmichael v. White*, 163 F.3d 1044, 1045 (8th Cir. 1998) (citing *Victor v. Hopkins*, 90 F.3d [at 279-80 & n.2, 282 . . .]). Habeas petitioners who delay filing for state postconviction relief "should be held

1. It should be noted that, of the cases cited by the *Akins* court regarding stays pending exhaustion, *Nowaczyk* involved the stay of a *fully-exhausted* petition, 299 F.3d at 80, *Palmer* upheld the dismissal of a *second*, untimely petition, 276 F.3d at 781-82, *Zarvela* required the *dismissal* of unexhausted claims prior to the grant of any stay, 254 F.3d at 380-82, and *Freeman* noted that "a prisoner who wants to pursue state relief while assuring an entitlement to federal relief can protect himself by filing in *both* courts." 208 F.3d at 577 (emphasis added). Only *Brambles* (itself a Ninth Circuit case) relied upon the principles announced by the majority in *Ford*.

> responsible for their failure to fulfill the long-standing requirement that they exhaust state remedies." *Jiminez v. Rice*, 276 F.3d 478, 482 (9th Cir. 2001). Akins has asserted unexhausted claims and there is no showing that it would be futile for him to pursue his available state court remedy, which he would have been wise to pursue in the first instance. We cannot conclude that the district court abused its discretion in not granting a stay *sua sponte*. *See Thompson v. Sec. for Dep't of Corr.*, 320 F.3d 1228, 1229-30 & n.3 (11th Cir. 2003) (holding district court did not abuse its discretion by dismissing mixed petition in spite of petitioner's argument that he had no choice but to file a mixed petition in order to meet the one-year filing deadline of AEDPA and preserve federal review for the exhausted claims).

Id. at 685-86.

As in *Akins*, the one-year limitation period lapsed while Ford pursued his unexhausted claims in district court. Courts, however, "are bound to follow . . . the Supreme Court's view [requiring dismissal of mixed petitions] as expressed in *Rose v. Lundy*." 341 F.3d at 686. Accordingly, the majority's "concoct[ion]," App. A41 (Silverman, J., dissenting), is in direct conflict with the holdings of this Court and at least three other circuit courts of appeals.

B. "Stay and Abeyance" and "Comity"

Despite Ford's contention that "[n]othing in the procedure approved by the court 'circumvents the AEDPA's limitations period,'" Opp'n at 15, the majority, by its holding, has institutionalized a procedure that promotes the amendment of stayed petitions with newly-exhausted (but time-barred) claims. Thus, despite this Court's insistence that only the timely filing of a claim in *state court* may toll the AEDPA's limitation period, *see Duncan v. Walker*, 533 U.S. at 179-80, the majority

holds that the timely filing of a habeas petition in *federal court* may accomplish the same goal. *See* App. A15.

The majority's holding also encourages piecemeal litigation. In *Rose v. Lundy*, this Court observed that "strict enforcement of the exhaustion requirement will encourage habeas petitioners to exhaust all of their claims in state court and to present the federal court with a single habeas petition." 455 U.S. at 520. Similarly, the purpose of the AEDPA is to encourage habeas petitioners to file *timely* and *fully exhausted* single habeas petitions. *See Duncan v. Walker*, 533 U.S. at 179-80. The majority's holding, in contrast, encourages the filing of "mixed" habeas petitions and the consideration of time-barred claims. Nothing Ford has cited suggests otherwise.

C. Rule of Civil Procedure 15(c) and "Relation Back"

Ford relies upon two decisions - *Graham v. Johnson*, 168 F.3d 762 (5th Cir. 1999) and *In re Gasery*, 116 F.3d 1051 (5th Cir. 1997) (*per curiam*) - for the proposition that "other circuits have held that a habeas application filed after a previous application was dismissed for non-exhaustion is a 'continuation' of the earlier application." Opp'n at 38. Neither case, however, supports Ford's proposition. In *Graham v. Johnson*, the Fifth Circuit actually *rejected* the contention that a second habeas petition may be deemed to "relate back" to an original petition that was dismissed without prejudice. In doing so, the court stated: "Construing an application filed after a previous application is dismissed without prejudice as a continuation of the first application for all purposes would eviscerate the AEDPA limitations period and thwart one of AEDPA's principal purposes." 168 F.3d at 780.

In re Gasery, on the other hand, involved the same court's consideration of a "*second or successive*" petition within the meaning of Rule 9(b) of the Rules Governing Section 2254 Cases. *See* 116 F.3d at 1051-52. In concluding that a petition refiled after dismissal was not successive, the Fifth Circuit held:

> We . . . conclude that Gasery's refiled petition is merely a continuation of his first collateral attack, not a "second or successive" within the meaning of § 2244(b). *See Benton* [*v. Washington*], 106 F.3d [162] . . . 164 [(7th Cir. 1996)] ("The sequence of filing, dismissal, exhaustion in state court, and refiling . . . might generate multiple docket numbers, but it would not be right to characterize it as successive collateral attacks.").

Id. at 1052.

Nothing in *Gasery* can be construed as suggesting that a second, untimely habeas petition may "relate back" to a prior petition in a proceeding that is no longer pending for purposes of the AEDPA's limitation period, particularly in light of the circuit court's subsequent pronouncements in *Graham*. *See Graham v. Johnson*, 168 F.3d at 780. At least six other circuit courts of appeals agree. *See, e.g., Neverson v. Bissonnette*, 261 F.3d 120, 126 (1st Cir. 2001) (relation back doctrine did not apply where the dismissal of initial habeas proceeding left "nothing to which Petition No. 2 could relate back"); *see also Newell v. Hanks*, 283 F.3d 827, 834 (7th Cir. 2002); *Marsh v. Soares*, 223 F.3d 1217, 1219-20 (10th Cir. 2000); *Warren v. Garvin*, 219 F.3d at 113; *Nyland v. Moore*, 216 F.3d 1264, 1266 (11th Cir. 2000); *Jones v. Morton*, 195 F.3d 153, 160-61 (3d Cir. 1999). Resolution of this conflict between the circuits is therefore necessary.

CONCLUSION

The petition for writ of certiorari should be granted.

Dated: November 24, 2003

Respectfully submitted,

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(2)

No. 03-221

Supreme Court, U.S.
FILED
FEB 23 2004
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

CHERYL K. PLILER, Warden of California State Prison—Sacramento, *Petitioner,*

v.

RICHARD HERMAN FORD, *Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOINT APPENDIX

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PETITION FOR WRIT OF CERTIORARI FILED AUGUST 8, 2003
WRIT OF CERTIORARI GRANTED JANUARY 9, 2004

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	c. USDC docket sheet Case No. CV 98-2556 WDK (SH)	10
	d. USDC docket sheet Case No. CV 98-2557 ER (SH)	17
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The following opinions, decisions, judgments, and orders have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the Petition for Writ of Certiorari:

Order Amending Opinion, and Denying Rehearing and Rehearing En Banc and Amended Opinion, for the Ninth Circuit Court of Appeals, amended May 15, 2003 A1-A45

Report and Recommendation of United States Magistrate Judge filed on July 20, 1998, Case No. CV 98-2557 RAP (SH) B1-B5

Order Adopting Report and Recommendation of United States Magistrate Judge filed on July 22, 1998, Case No. CV 98-2557 RAP (SH) B6-B7

Judgment of the United States District Court for Central District of California, entered on July 27, 1998, Case No. CV 98-2557 RAP (SH) B8

Report and Recommendation of United States Magistrate Judge filed on June 25, 1998, Case No. CV 98-2556 RAP (SH) C1-C6

Order Adopting Report and Recommendation of United States Magistrate Judge filed on June 29, 1998, Case No. CV 98-2556 RAP (SH) C7-C8

Judgment of the United States District Court entered on June 30, 1998, Case No. CV 98-2556 RAP (SH) C9

Report and Recommendation of United States Magistrate Judge filed on September 9, 1997, Case No. CV 97-3386 RAP (SH) D1-D2

Order Adopting Report and Recommendation of United States Magistrate Judge filed on October 8, 1997, Case No. CV 97-3386 RAP (SH) D3-D4

Judgment of the United States District Court entered on October 14, 1998, Case No. CV 97-3386 RAP (SH) D5

Report and Recommendation of United States Magistrate Judge filed on September 10, 1997, Case No. CV 97-3385 RAP (SH) E1-E4

Order Adopting Report and Recommendation of United States Magistrate Judge entered on September 11, 1997, Case No. CV 97-3385 RAP (SH) E5-E6

Judgment of the United States District Court entered on September 12, 1997, Case No. CV 97-3385 RAP (SH) E7

Docket as of June 17, 2003 7:31 pm

U.S. District Court
Central District of California (Western Div.)
CIVIL DOCKET FOR CASE #: 97-CV-3385
Richard Herman Ford v. S. Hubbard, et al
Filed: 05/05/97
Assigned to: Judge Richard A. Paez
Referred to: Magistrate Judge Stephen J. Hillman
Demand: $0,000 Nature of Suit: 530
Lead Docket: None
Jurisdiction: Federal Question
Dkt# in other court: None
Cause: 28:2254 Petition: Writ of H/C - State

RICHARD HERMAN FORD petitioner	Richard Herman Ford Prison No. E-10539 [COR LD NTC] [PRO SE] Represa California State Prison P O Box 290066 Represa, CA 95671-0066
v.	
S HUBBARD, Warden (A) CSP-SAC respondent	William T Harter FTS Ext 2386 FAX 213-897-6496 [COR LD NTC] Stephen M Kaufman FTS Ext 6753 FAX 213-897-6496 [COR LD NTC]
ATTORNEY GENERAL STATE OF CALIFORNIA respondent	Robert F Katz FTS Ext 2384 FAX 213-897-6496 [COR LD NTC]
DANIEL LUNGREN respondent	CAAG - Office of Attorney General of California 300 S Spring St, Ste 5000 Los Angeles, CA 90013-1230 213-897-2000

RICHARD HERMAN FORD
petitioner

v.

S HUBBARD, Warden
(A) CSP-SAC; ATTORNEY GENERAL
STATE OF CALIFORNIA; DANIEL LUNGREN
respondent

DOCKET PROCEEDINGS

5/5/97	1	PETITION FOR WRIT OF HABEAS CORPUS by petitioner Richard Herman Ford in State Custody referred to Magistrate Judge Stephen J. Hillman . (jp) [Entry date 05/08/97]
5/5/97	2	NOTICE and ORDER of Reference to Magistrate Judge Stephen J. Hillman (jp) [Entry date 05/08/97]
5/12/97	3	ORDER requiring ans to the ptn for writ of H/C by Magistrate Judge Stephen J. Hillman (see doc for details) (jag) [Entry date 05/14/97]
5/12/97	4	MINUTES: This case has been referred to Mag Judge Hillman. by Magistrate Judge Stephen J. Hillman CR: n/a (jag) [Entry date 05/14/97]
5/12/97	5	MINUTES: The crt is in rcpt of ptnr's mot to stay fed H/C ptn. Resp is ordered to resp to ptnr's mot in the ans to be fld by resp. by Magistrate Judge Stephen J. Hillman CR: n/a (jag) [Entry date 05/14/97]
5/16/97	6	RECEIPT of prf of delivery of MO ptn & ord dtd 5/12/97; served upon the Office of the Atty Gen on 5/15/9077 (jag) [Entry date 05/19/97]

5/19/97	7	RECEIPT of proof of selivery by mail of Ord/M.O. dtd 5/12/97 rcd by Richard Herman Ford on 5/14/97 (el) [Entry date 05/20/97]
6/2/97	8	APPLICATION by respondents for extension of time; decl of Stephen M Kaufman (jag) [Entry date 06/03/97]
6/2/97	--	LODGED/PROPOSED Order (FWD TO CRD) (jag) [Entry date 06/03/97]
6/4/97	9	ANSWER TO PETITION for Writ of H/C by respondent S Hubbard [1-1] (jag) [Entry date 06/05/97]
6/12/97	10	AMENDED ANSWER TO PETITION for Writ of H/C by respondent S Hubbard, respondent Atty General State, respondent Daniel NMI Lungren [1-1] (jag) [Entry date 06/13/97]
7/3/97	11	APPLICATION by respondents for extension of time; decl of Stephen M Kaufman (jag) [Entry date 07/08/97]
7/3/97	--	LODGED/PROPOSED ORDER submitted by respondent for application [11-1] .(FWD TO CRD) (jag) [Entry date 07/08/97]
7/7/97	12	ORDER re fur procdgs on a partially exhausted ptn (see doc for details) by Magistrate Judge Stephen J. Hillman (jag) [Entry date 07/10/97]
7/15/97	13	RETURN TO PETITION for Writ of H/C by respondent S Hubbard, respondent Atty General State, respondent Daniel NMI Lungren [1-1] (jag) [Entry date 07/16/97]
7/28/97	14	RETURN by petr Richard Herman Ford to crt ord re fur proceedings [12-1] & mot for ext of time. (gk) [Entry date 07/29/97]
7/28/97	15	TRAVERSE by petr Richard Herman Ford to

return [13-1]. (gk) [Entry date 07/29/97]

8/5/97 16 REPORT AND RECOMMENDATION of U.S. Magistrate Judge Stephen J. Hillman that the crt enter an ord denying the ptn & dismissing the actn w/out prej (jag) [Entry date 08/06/97]

8/5/97 17 NOTICE OF FILING REPORT AND RECOMMENDATION of U.S. Magistrate Judge Stephen J. Hillman and lodging of proposed judgment and/or ord (jag) [Entry date 08/06/97]

8/25/97 18 OBJECTIONS by petitioner Richard Herman Ford to Report and Recommendation [16-1] (jag) [Entry date 08/26/97]

9/10/97 19 FINAL REPORT AND RECOMMENDATION of U.S. Magistrate Judge Stephen J. Hillman (ENT 9/12/97) mld cpys (bp) [Entry date 09/12/97]

9/10/97 22 MINUTES: This crt has rcvd & reviewed ptnr's amd ptn for writ of H/C. The crt clk is ordered to reject & return to ptnr the amd ptn for the reasons stated in the final R&R issd by this crt. by Magistrate Judge Stephen J. Hillman CR: n/a (jag) [Entry date 09/12/97]

9/11/97 20 ORDER by Judge Richard A. Paez adopting final report & recommendation of the U.S. Mag Judge [19-1] (ENT 9/12/97) mld cpys & ntc. (bp) [Entry date 09/12/97]

9/11/97 21 JUDGMENT AND ORDER: It is ADJUDGED that the petition for writ of H/C is dismissed without prejudice. by Judge Richard A. Paez . terminating case (ENT 9/12/97) MD JS-6 mld cpys (bp) [Entry date 09/12/97]

7/25/01 23 Order From USCA: Aplles' mot to strike portions of the ecerpts of record is ref to panel

that will decide merits of this app. Applnt's mot for reief is den as unnecessary. This case is ready for cal. 98-80477, 98-80603 (dl) [Entry date 08/10/01]

10/29/01 -- CLERK'S record on appeal transmitted to Circuit vols: 1 (related CA # 98-56587) (dl) [Entry date 10/29/01]

6/13/02 24 Order from USCA: Submission of these cases is vac. The cases will be held pending the Supreme Crt's decision in Saffold v. Newland, 250 F.3d 1262 (9th Cir.2000), cert. gr, 122 S. Ct. 393 (2001) (No. 01-301). 98-80477, 98-80582, 98-80603 (dl) [Entry date 06/24/02]

6/2/03 25 ORDER FROM USCA Respondents-Appellees' motion for a 90-day stay of the issuance of the mandate pending application for writ of certiorari is granted. Therefore, it is ordered that the mandate is stayed for ninety (90) days pending the Respondents-Appellees' potential filing of a petition for writ of certiorari in the supreme Court. If such a petition is filed, and if the writ of certiorari is granted by the Supreme Court, the stay shall continue until final disposition by the Supreme Court. (98-80477, 98-80582, 98-80603) (pjap) [Entry date 06/17/03]

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Docket as of October 29, 2001 7:21 pm

U.S. District Court
Central District of California (Western Div.)
CIVIL DOCKET FOR CASE #: 97-CV-3386
Richard Herman Ford v. S. Hubbard, et al
Filed: 05/05/97
Assigned to: Judge Richard A. Paez
Referred to: Magistrate Judge Stephen J. Hillman
Demand: $0,000 Nature of Suit: 530
Lead Docket: None Jurisdiction: Federal Question
Dkt# in other court: None
Cause: 28:2254 Petition: Writ of H/C - State

RICHARD HERMAN FORD petitioner	Richard Herman Ford Prison No. E-10539 [COR LD NTC] [PRO SE] Represa California State Prison P O Box 290066 Represa, CA 95671-0066
v.	
S HUBBARD, Warden (A) CSP-SAC respondent	Paul C Ament FTS Ext 2248 FAX 213-897-6496 [COR LD NTC] Robert F Katz FTS Ext 2384 FAX 213-897-6496 [COR LD NTC] CAAG - Office of Attorney General of California 300 S Spring St, Ste 500 Los Angeles, CA 90013-1204 213-897-2000
ATTORNEY GENERAL STATE OF CALIFORNIA respondent	Paul C. Ament (See above) [COR LD NTC] Robert F Katz (See above) [COR LD NTC]
DANIEL LUNGREN respondent	Paul C Ament (See above) [COR LD NTC]
RICHARD HERMAN FORD petitioner	

v.

S HUBBARD, Warden (A) CSP-SAC; ATTORNEY GENERAL STATE OF CALIFORNIA; DANIEL LUNGREN
respondent

DOCKET PROCEEDINGS

5/5/97	1	PETITION FOR WRIT OF HABEAS CORPUS by petitioner Richard Herman Ford in State Custody referred to Magistrate Judge Stephen J. Hillman . (jp) [Entry date 05/08/97]
5/5/97	2	NOTICE and ORDER of Reference to Magistrate Judge Stephen J. Hillman (jp) [Entry date 05/08/97]
5/12/97	3	MINUTES: Resp is ordered to resp to ptnr's mot in the ans to be filed by resp. by Magistrate Judge Stephen J. Hillman CR: n/a (tw) [Entry date 05/14/97]
5/12/97	4	ORDER requiring ans to ptn for writ of habeas corpus & instructions re fur proceedings by Magistrate Judge Stephen J. Hillman . It is ordered that the resp or atty general of state of calif file an ans to ptn not later than 20 dys after filing dt of this ord. It is fur ordered that ptnr file a single traverse to the ans & return w/i 20 dys after the filing of the return (tw) [Entry date 05/14/97] [Edit date 05/14/97]
5/12/97	5	MINUTES: This case has been referred to Magistrate Judge Stephen J. Hillman. All future pldgs & correspondence sh be addressed to Sandra Butler. by Magistrate Judge Stephen J. Hillman CR: n/a (tw) [Entry date 05/15/97]
5/22/97	6	RECEIPT showing proof of delivery by legal

		mail of ord req ans received by Richard Ford on 5/19/97 (shb) [Entry date 05/28/97]
5/30/97	7	ANSWER TO PETITION for Writ of H/C by respondent S Hubbard, respondent Atty General State, respondent Daniel NMI Lungren [1-1] (shb) [Entry date 06/02/97]
6/2/97	8	Certified mail return RECEIPT showing proof of delivery of order req ans to petition, first min otd and min ord re pltf mot received by Torres, Office of the A/G on 5/16/97 (shb) [Entry date 06/03/97]
6/3/97	9	ORDER RE TRANSF PURS TO GO 224 (REL CSE) by Judge James M. Ideman Case reassigned to Judge Richard A. Paez for all further proceedings [L/N CV97-3385 RAP (SH)] (cc: ptys) (jc) [Entry date 06/03/97]
6/20/97	10	RETURN TO PETITION for Writ of H/C by respondent S Hubbard, respondent Atty General State, respondent Daniel NMI Lungren [1-1] (jag) [Entry date 06/24/97]
7/15/97	11	TRAVERSE by petitioner Richard Herman Ford to return to petition [10-1] (bp) [Entry date 07/16/97]
7/15/97	12	RESPONSE; Return to respondent's answer with exhibits A, B, & C. by petitioner Richard Herman Ford to [10-1] (bp) [Entry date 07/16/97]
8/4/97	13	ORDER by Magistrate Judge Stephen J. Hillman re fur proceedings on a partially exhausted petn: petr's mot for stay is denied. (dh) [Entry date 08/07/97]
9/9/97	14	NOTICE OF FILING REPORT AND RECOMMENDATION of U.S. Magistrate Judge Stephen J. Hillman and lodging of

proposed judgment (yt) [Entry date 09/11/97]

9/9/97 15 REPORT AND RECOMMENDATION of U.S. Magistrate Judge Stephen J. Hillman (yt) [Entry date 09/11/97]

9/18/97 16 RECEIPT of proof of delivery by legal mail, signe by Richard Herman on 9/12/97. (bp) [Entry date 09/22/97]

10/8/97 17 ORDER by Judge Richard A. Paez adopting report and recommendation motion NOTICE OF FILING REPORT AND RECOMMENDATION [14-1] (ENT 10/14/97) mld cpys & ntc. (bp) [Entry date 10/14/97]

10/8/97 18 JUDGMENT AND ORDER: It is ADJUDGEDthat the pet for writ of H/C is dismissed without prej. by Judge Richard A. Paez. terminating case (ENT 10/14/97) MD JS-6 mld cpys & ntc. (bp) [Entry date 10/14/97]

10/29/01 -- CLERK'S record on appeal transmitted to Circuit vols: 1 (Related CA # 98-56587) (dl) [Entry date 10/29/01]

Docket as of June 17, 2003 7:33 pm

U.S. District Court
Central District of California (Western Div.)
CIVIL DOCKET FOR CASE #: 98-CV-2556
Richard Herman Ford v. S Hubbard, et al
Filed: 04/07/98
Assigned to: Judge Richard A. Paez
Referred to: Magistrate Judge Stephen J. Hillman
Demand: $0,000
Nature of Suit: 530
Lead Docket: None
Jurisdiction: Federal Question
Dkt # in other court: None
Cause: 28:2254 Petition: Writ of H/C - State

RICHARD HERMAN FORD petitioner	Richard Herman Ford Prison No. E-10539 [COR LD NTC] [PRO SE] Represa California State Prison P O Box 290066 Represa, CA 95671-0066
v.	
S HUBBARD, Warden respondent	William T Harter FTS Ext 2386 FAX 213-897-6496 [COR LD NTC] Paul C Ament FTS Ext 2248 FAX 213-897-6496 [COR LD NTC] CAAG - Office of Attorney General of California 300 S Spring St, Ste 5000 Los Angeles, CA 90013-1230 213-897-2000
DANIEL LUNGREN respondent	Paul C Ament (See above) [COR LD NTC]

RICHARD HERMAN FORD
petitioner

v.
S HUBBARD, Warden;
DANIEL LUNGREN
respondent

DOCKET PROCEEDINGS

4/7/98	1	PETITION FOR WRIT OF HABEAS CORPUS by petitioner Richard Herman Ford in state Custody referred to Magistrate Judge Stephen J.Hillman . (bg) [Entry date 04/13/98]
4/7/98	2	NOTICE and ORDER of Reference to Magistrate Judge Stephen J. Hillman (bg) [Entry date 04/13/98]
4/9/98	3	MINUTES: Re fur procdgs by Magistrate Judge Stephen J. Hillman CR: none (lc) [Entry date 04/13/98]
4/9/98	4	ORDER req ans to petn; resp file ans nlt 20 days aft filing date of this ord and lodge all pertinent state recs; petrn file single trav to ans and retn w/i 20 days aft filing of retn; 30 days aft retn, case wil be deemed subm by Magistrate Judge Stephen J. Hillman (lc) [Entry date 04/13/98]
4/16/98	5	RETURN RECEIPT of Certified Mail showing delivery to CAAG rcvd by B E Knecht of petn, min of 4/10/98 on 4/14/98 (lc) [Entry date 04/17/98]
4/29/98	6	ANSWER TO PETITION for Writ of H/C by respondents [1-1] (el) [Entry date 04/30/98]
5/11/98	7	NOTICE OF MOTION AND MOTION by respondent S Hubbard, respondent Daniel

		Lungren to dismiss (dmjr) [Entry date 05/12/98]
5/13/98	8	ORDER RE TRANSFER PURSUANT TO GENERAL ORDER 224 (Related Case) filed. [Related Case no.: CV97-3385 RAP (SH)] Case transferred from Judge William D. Keller to Judge Richard A. Paez for all further proceedings. The case number will now reflect the initials of the transferee Judge [CV98-2556 RAP (SH)]. (cc: all counsel) (jc) [Entry date 05/13/98]
5/13/98	9	MINUTES: This Crt has rcvd rspdnts' Mot to Dism filed on 5/11/98. Any Opp or Ntc of Non-Opp shall be svd and filed by 5/26/98. A Reply shall be due by 6/2/98. the mtr will thereafter be taken under submission by Magistrate Judge Stephen J. Hillman CR: n/a (pbap) [Entry date 05/14/98]
5/22/98	10	APPLICATION for ext of ti to fi retn to 30 days after denial pf res' mtn to dism by respondents (el) [Entry date 05/27/98]
5/22/98	--	LODGED/PROPOSED ORDER submitted by respondent for application [10-1] .(FWD TO CRD) (el) [Entry date 05/27/98]
5/27/98	11	OPPOSITION by petitioner to motion to dismiss [7-1] (dmjr) [Entry date 05/28/98]
5/28/98	12	ORDER by Magistrate Judge Stephen J. Hillman granting application [10-1] respondents hv 30 days following any denial of mot to dism to fi retn to petn. Petnr may fi a trav 15 days thereafter (dmjr) [Entry date 06/01/98]
6/1/98	13	REPLY by respondent to response to motion to dismiss [7-1] (dmjr) [Entry date 06/03/98]
6/3/98	14	REPORT AND RECOMMENDATION issd by Magistrate Judge Stephen J. Hillman

recommending that the Crt issue an Ord: (1) approving and adopting this R & R; and (2) directing tht jgm be entrd dism the actn w/prej. (pbap) [Entry date 06/05/98]

6/4/98 15 NOTICE OF FILING REPORT AND RECOMMENDATION by Magistrate Judge Stephen J. Hillman and Lodging of Proposed Judgment and Order (pbap) [Entry date 06/05/98]

6/23/98 16 OPPOSITION by petitioner Richard Herman Ford to the rept & recommendation of US Mag Judge [14-1] (et) [Entry date 06/24/98]

6/25/98 17 REPORT AND RECOMMENDATION issd by Magistrate Judge Stephen J. Hillman recommending that the crt iss an ord approving & adopting this R&R; & dir tht jgm be ent dism the act w/prej. (mld cpies & nots) (lori) [Entry date 06/30/98] [Edit date 06/30/98]

6/29/98 18 ORDER by Judge Richard A. Paez adopting R&R of US Mag Judge [17-1] (Ent 6/30/98), mld cpies & nots. (lori) [Entry date 06/30/98]

6/29/98 19 JUDGMENT tht the pet for Writ of Habeas Corpus is dism w/prej by Judge Richard A. Paez. terminating case (Ent 6/30/98), Mld cpies & nots, MD JS-6. (lori) [Entry date 06/30/98]

7/27/98 20 NOTICE OF APPEAL by petitioner Richard Herman Ford to 9th C/A from Dist. Court ord ent 6/20/98 [19-2] (cc: Richard Herman Ford: St. Atty Gen) COA/CPC Pending) (dmap) [Entry date 07/28/98]

7/27/98 21 PETITION/Mottion for Appealabity Certification by petitioner Richard Herman Ford (FWD TO CRD) (dmap) [Entry date 07/28/98]

7/27/98 -- LODGED Mot for lv to app in Forma Pauperis

submitted by petitioner Richard Herman Ford (FWD TO CRD) (dmap) [Entry date 07/28/98]

8/3/98 22 ORDER by Judge Richard A. Paez denying petition for Certificate of Appealability for the following reasons stated in the Report & Recommendation on 6/29/98 and as appended hereto, there has been no substantial showing of the dneial of a constitutional right. [21-1] (fvap) [Entry date 08/07/98]

8/12/98 23 CERTIFICATE of Record Transmitted to USCA (cc: all parties) (pjap) [Entry date 08/12/98]

8/12/98 -- CLERK'S record on appeal transmitted to Circuit [20-1] vols: 1 (pjap) [Entry date 08/12/98]

8/28/98 24 NOTIFICATION by Circuit Court of Appellate Docket Number appeal [20-1] 98-56331 (ghap) [Entry date 09/01/98]

9/1/98 25 NOTICE OF APPEAL by petitioner Richard Herman Ford to 9th C/A from Dist. Court Ord fld 8/3/98 [22-1] (cc: Richard Herman Ford; State Attorney General) Fee: FP Pending. (pjap) [Entry date 09/14/98]

9/1/98 -- LODGED Motion, Affidavit & Ord re Appeal In Forma Pauperis submitted by petitioner Richard Herman Ford (FWD TO CRD) (pjap) [Entry date 09/22/98]

9/16/98 26 MINUTES: Crt refers plf's req for lv to proceed in forma pauperis to the Mag Judge for preparation of propsd ord. by Judge Richard A. Paez CR: n/a (jag) [Entry date 09/17/98]

9/28/98 -- LODGED 9th cca ord req for a cert of appealability is denied. (FWD TO CRD) CA# 98-56331 (ghap) [Entry date 10/19/98]

10/1/98	27	CERTIFIED COPY of Appellate Court Order: 98-56331 denying certificate of appealability [20-1]. (ENT 10/6/98) mld cpys (pbap) [Entry date 10/06/98]
10/2/98	28	MANDATE from Circuit Court of Appeals tht the certificate of appealability is hereby filed and spread upon the minutes of this Dist Crt. (pbap) [Entry date 10/06/98]
10/2/98	31	RECORD on appeal returned from U.S. Court of Appeals re appeal [25-1] vols: 1 (dl) [Entry date 10/20/98]
10/5/98	29	ORDER by Judge Richard A. Paez granting Forma Pauperis status on appeal; denying certificate of appealability [0-0] (fvap) [Entry date 10/08/98]
10/14/98	30	NOTIFICATION by Circuit Court of Appellate Docket Number appeal [25-1] 98-56587 (pjap) [Entry date 10/14/98]
7/25/01	32	Order From USCA: Apells' mot to strike portions of the excerpts of record is ref to panel that will decide the merits of this app. Applnt's mot for relief is den unnecessary. This case is ready for cal. #98-56587 (dl) [Entry date 08/10/01]
10/29/01	--	CLERK'S record on appeal transmitted to Circuit [25-1] vols: 1 (# 98-56587) (dl) [Entry date 10/29/01]
6/13/02	33	Order from USCA: Submission of these cases is hereby vac. The cases will be held pending the Supreme Crt's decision in Saffold v. Newland, 250 F.3d 1262 (9th Cir. 2000), cert. gr, 122 S.Ct. 393 (2001) (No. 01-301) 98-56587 (dl) [Entry date 06/24/02]
6/2/03	34	ORDER FROM USCA Respondents-Appellees'

motion for a 90-day stay of the issuance of the mandate pending application for writ of certiorari is granted. Therefore, it is ordered that the mandate is stayed for ninety (90) days pending the Respondents-Appellees' potential filing of a petition for writ of certiorari in the Supreme Court. If such a petition is filed, and if the writ of certiorari is granted by the Supreme Court, the stay shall continue until final disposition by the Supreme Court. ((98-56587) (pjap) [Entry date 06/17/03]

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Docket as of June 17, 2003 7:33 pm

U.S. District Court
Central District of California (Western Div.)

CIVIL DOCKET FOR CASE #: 98-CV-2557
Richard H Ford v. S Hubbard, et al
Filed: 04/07/98
Assigned to: Judge Richard A. Paez
Referred to: Magistrate Judge Stephen J. Hillman
Demand: $0,000
Nature of Suit: 530
Lead Docket: None
Jurisdiction: Federal Question
Dkt# in other court: None
Cause: 28:2254 Petition: Writ of H/C - State

RICHARD HERMAN FORD petitioner	Richard Herman Ford Prison No. E-10539 [COR LD NTC] [PRO SE] Represa California State Prison P O Box 290066 Represa, CA 95671-0066
v.	
S HUBBARD, Warden respondent	Stephen M Kaufman FTS Ext 6753 FAX 213-897-6496 [COR LD NTC] Kenneth C Byrne FTS Ext 2687 FAX 213-897-6496 [COR LD NTC] CAAG - Office of Attorney General of California 300 S Spring St, Ste 5000 Los Angeles, CA 90013-1230 213-897-2000

RICHARD HERMAN FORD
petitioner

v.

S HUBBARD, Warden; DANIEL LUNGREN
respondent

DOCKET PROCEEDINGS

4/7/98	1	PETITION FOR WRIT OF HABEAS CORPUS by petitioner Richard Herman Ford in state Custody referred to Magistrate Judge Stephen J. Hillman . (bg) [Entry date 04/13/98]
4/7/98	2	NOTICE and ORDER of Reference to Magistrate Judge Stephen J. Hillman (bg) [Entry date 04/13/98]
4/9/98	4	ORDER by Magistrate Judge Stephen J. Hillman that respndts or Atty General of State of CA are ord to file an ans to petn NLT 20 days after the flg date of this ord. Respndts shall file a return to petn NLT 30 days after the flg of the ans. Petr is ord to file a single traverse to the ans & return w/in 20 days after the flg of the return. (see orig doc for addtl info). (dhl) [Entry date 04/13/98]
4/10/98	3	MINUTES: This case has been ref'd to Mag Judge Hillman. All future pleadings & correspondence shall be addressed to Sandra Butler, Clerk to Mag Judge Hillman (please see orig doc for instructions in preparing & sumitting all pleadings). by Magistrate Judge Stephen J. Hillman CR: n/a (dhl) [Entry date 04/13/98]

4/16/98	5	RETURN RECEIPT of Certified Mail showing delivery to CAAG rcvd by B E Knecht of petn, ord of 4/10/98 on 4/14/98 (lc) [Entry date 04/17/98]
4/29/98	6	ANSWER TO PETITION for Writ of H/C by respondent [1-1] (el) [Entry date 04/30/98]
5/13/98	7	ORDER RE TRANSFER PURSUANT TO GENERAL ORDER 224 (Related Case) filed. [Related Case no.: CV97-3385 RAP (SH)] Case transferred from Judge Edward Rafeedie to Judge Richard A. Paez for all further proceedings. The case number will now reflect the initials of the transferee Judge[CV98-2557RAP (SH)]. (cc: all counsel) (jc) [Entry date 05/13/98]
5/20/98	8	APPLICATION for ext of ti by respondents (pbap) [Entry date 05/21/98]
5/20/98	--	LODGED/PROPOSED ORDER submitted. (FWD TO CRD) (pbap) [Entry date 05/21/98]
5/21/98	9	ORDER by Magistrate Judge Stephen J. Hillman granting application [8-1] that res is granted to & incl 6/28/98 in wh/c to fi the ord retn to the amd ptn; that ptnr is granted 21 days to fi a traverse to the ans. (el) [Entry date 05/26/98]
6/5/98	10	NOTICE OF MOTION AND MOTION by respondent S Hubbard, respondent Daniel Lungren to dismiss petn (dmjr) [Entry date 06/08/98]
6/5/98	11	NOTICE by respondent of lodging docs (dmjr) [Entry date 06/08/98]
6/8/98	12	MINUTES: opp to mot to dism by 6/2/298, rply by 6/29/98, matter then under subm by Magistrate Judge Stephen J. Hillman CR: n/a (dmjr) [Entry date 06/08/98]

6/10/98	13	MINUTES (in chambers): by Magistrate Judge Stephen J. Hillman Ord filed 05/28/98 is hereby mod to provide that petr may file a Traverse within 20 dyas aft resp files a Rtn (in the event that the resp mtn to dism is den) CR: N/A (rm) [Entry date 06/16/98]
6/17/98	14	OPPOSITION by petitioner to motion to dismiss petn [10-1] (dmjr) [Entry date 06/18/98]
6/26/98	15	NOTICE OF FILING REPORT AND RECOMMENDATION by Magistrate Judge Stephen J. Hillman and Lodging of Proposed Judgment and Order (et) [Entry date 06/30/98]
6/26/98	16	REPORT AND RECOMMENDATION issd by Magistrate Judge Stephen J. Hillman recommending that to Judge Richard A. Paez (et) [Entry date 06/30/98]
7/16/98	17	OPPOSITION by petitioner Richard Herman Ford to Report and Recommendation [16-1] (pbap) [Entry date 07/22/98]
7/20/98	18	REPORT AND RECOMMENDATION issd by Magistrate Judge Stephen J. Hillman (dmjr) [Entry date 07/27/98]
7/22/98	19	ORDER by Judge Richard A. Paez adopting [18-1] R&R (ENT 7/27/98) cc: counsel (dmjr) [Entry date 07/27/98]
7/22/98	20	JUDGMENT AND ORDER: by Judge Richard A. Paez. dismissing the habeas corpus petition [1-1] w/prej terminating case MD JS-6 (ENT 7/27/98) md ntc (cc: all counsel) (dmjr) [Entry date 07/27/98]
8/17/98	21	NOTICE OF APPEAL by petitioner Richard Herman Ford to 9th C/A from Dist. Court Jgm & Ord fld 7/22/98 & ent 7/27/98 [20-1][19-1] (cc: Richard Herman Ford; State Attorney

		General) CPC/COA Pending. (pjap) [Entry date 08/21/98]
8/17/98	22	PETITION/Notice and Motion For Appealability Certification by petitioner Richard Herman Ford (FWD TO CRD) (pjap) [Entry date 08/21/98]
8/17/98	--	LODGED Motion, Affidavit & Ord re: Appeal In Forma Pauperis submitted by petitioner Richard Herman Ford (FWD TO CRD) (pjap) [Entry date 08/21/98]
8/21/98	23	NOTICE OF REFERRAL of Matter to the Magistrate Judge filed; referring ntc & mot for appealability certification to Magistrate Judge Stephen J. Hillman (jag) [Entry date 08/25/98]
8/25/98	24	ORDER by Judge Richard A. Paez denying petition for certificate of appealability, and granting in forma pauperis status on appeal. [22-1] (fvap) [Entry date 08/28/98]
9/14/98	25	CERTIFICATE of Record Transmitted to USCA (cc: all parties) (dl) [Entry date 09/14/98]
9/14/98	--	CLERK'S record on appeal transmitted to Circuit [21-1] vols: 1 and 1 envelope ldg docs (dl) [Entry date 09/14/98]
9/16/98	26	NOTIFICATION by Circuit Court of Appellate Docket Number appeal [21-1] 98-56455 (dl) [Entry date 09/17/98]
2/3/99	28	RECORD on appeal returned from U.S. Court of Appeals re appeal [21-1] vols: 1 & 1 envelope of st crt ldg doc's (ghap) [Entry date 04/20/99]
2/22/99	27	RECEIPT frm CA Atty Gen for retn of doc lodged 6/5/98 (dmjr) [Entry date 02/24/99]
3/1/01	29	ORDER FROM USCA: Applnt's 'motn to compel filing of applnt's opening brief &

		excerpts of record nunc pro tunc" construed as motn for relief fr default. So construed, motn gr. Brief set. (98-56455; 98-56587; 98-80477; 98-80603) (wdc) [Entry date 03/14/01]
7/25/01	30	Order From USCA: Aplles' mot to strike portions of excerpts of record is ref to panel that will decide the merits of this app. Applnt's mot for relief is den as unnecessary. This case is ready for cal. #98-56455 (dl) [Entry date 08/10/01]
10/1/01	--	CLERK'S record on appeal transmitted to Circuit [21-1] vol: 1 (98-56455). (wdc) [Entry date 10/01/01]
6/13/02	31	ORDER FROM USCA: submission of these cases is hereby vac. The cases will be held pending the Supreme Court's decision. (98-56455) (weap) [Entry date 06/21/02] [Edit date 06/21/02]
6/2/03	32	ORDER FROM USCA Respondents-Appellees' motion for a 90-day stay of the issuance of the mandate pending application for writ of certiorari is granted. Therefore, it is ordered that the mandate is stayed for ninety (90) days pending Respondents-Appellees' potential filing of a petition for writ of certiorari in the Supreme Court. If such a petition is filed, and if the writ of certiorari is granted by the Supreme Court, the stay shall continue until final disposition by the Supreme Court. (98-56455) (pjap) [Entry date 06/17/03]

Docket as of September 9, 2003 11:15 pm

GENERAL DOCKET
US Court of Appeals for the Ninth Circuit

Court of Appeals Docket #: 98-56455 Filed: 9/15/98
Nsuit: 3530 Habeas corpus (Fed)
Ford v. Hubbard, et al
Appeal from: Central District of California, Los Angeles

Case type information:
1) prisoner petition
2) state
3) habeas corpus

Lower court information:

District: 0973-2 : CV-98-02557-RAP-SH
presiding judge: Terry J. Hatter, Jr., Chief District Judge
presiding judge: Richard A. Paez, District Judge
Date Filed: 4/7/98
Date order/judgment: 7/27/98
Date NOA filed: 8/17/98

Fee status: in forma pauperis

Prior cases:
None

Current cases:

	Lead	Member	Start	End
companion:	98-80477	98-80603	9/28/98	

consolidated:

98-56455	98-80603	1/22/99
98-56455	98-80582	1/22/99
98-56455	98-80477	1/22/99
98-56455	98-56587	1/22/99

related:

98-56331	98-80582	9/10/98
98-56331	98-56587	9/25/98
98-56331	98-56455	9/15/98

RICHARD HERMAN FORD
Petitioner - Appellant

Richard Herman Ford
#E-10539
[COR LD NTC prs]
P.O. Box 290066
Represa, CA 95671

Lisa M. Bassis
323/848-8733
[COR LD NTC cja]
Lisa M. Bassis
(See above)
[COR LD NTC cja]
P.O. Box 691956
Los Angeles, CA 90069

v.

S. HUBBARD, Warden
Respondent - Appellee

Paul C. Ament
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213-897-2000
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AGCA - OFFICE OF
THE CALIFORNIA ATTORNEY
GENERAL (SAN DIEGO)
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DANIEL E. LUNGREN,
Attorney General
Respondent - Appellee

Paul C. Ament
(See above)
[COR LD NTC dag]
Paul M. Roadarmel, Jr.
FAX 213
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AGCA - OFFICE OF THE

CALIFORNIA ATTORNEY
GENERAL (LA)
300 South Spring St.
Los Angeles, CA 90013

RICHARD HERMAN FORD
Petitioner - Appellant

v.

S. HUBBARD, Warden;
DANIEL E. LUNGREN, Attorney General
Respondents - Appellees

98-56455 Ford v. Hubbard, et al

9/15/98 Filed request for a certificate of appealability. Date COA denied in DC: 8/25/98 District Court file included (y/n): y (1 Orig. DC file & 1 envelope of lodged documents)(MOATT) (lu) [98-56455]

9/15/98 Filed certificate of record on appeal RT filed in DC NT. (case file) [98-56455] (lu) [98-56455]

1/20/99 FILED CERTIFIED RECORD ON APPEAL: 1 CLERKS REC 0 RTs 1 LARGE ENVELOPE - LODGING OF DOCUMENTS (orig) [98-56455] (mu) [98-56455]

1/22/99 Filed order (Robert R. BEEZER, Andrew J. KLEINFELD, Michael D. HAWKINS): The court con these matters to enable the court to conduct a complete review of the records. The court also grants the request for a COA to address the statute of limitations issue. As to other issues raised by pet, the request for COA is dn without prejudice to renewal by csl based upon a complete review of the records. Appellant is granted leave to proceed IFP. The court also appoints csl for appellant. Csl will be appointed by separate order. The clerk shall serve a copy of this

order by facsmile transmission on Maria E. Stratton, FPD., who will locate appointed csl. The dc shall provide this court with the name and address of appointed csl within 14 days of locating csl. The opening brief and excerpts of record are due 5/10/99; the answering brief is due 6/9/99; the optional reply brief is due within 14 days after service of the answering brief. [98-56455, 98-56587, 98-80477, 98-80582, 98-80603] (rei) [98-56455 98-80477 98-80582 98-80603]

1/22/99 Filed order (Robert R. BEEZER, Andrew J. KLEINFELD, Michael D. HAWKINS): The court con these matters to enable the court to conduct a complete review of the records. The court also grants the request for a COA to address the statute of limitations issue. As to the other issues raised by pet, the request for COA is dn without prejudice to renewal appellant is granted to leave to proceed IFP. The court also appoints csl for appellant. Csl will be appointed by facsmile transmision on Maria E. Stratton, FPD., who will locate appointed csl. The dc shall provide this court with the name and address of appointed csl within 14 days of locating csl. The opening brief and excerpts of record are due 5/10/99; the answering brief is due 6/9/99; the optional reply brief is due within 14 days after service of the answering brief. [98-56455, 98-56587, 98-80477, 98-80582, 98-80603] (rei) [98-56455 98-56587 98-80477 98-80582 98-80603]

2/10/99 Received copy of District Court order filed on 2/2/99 appoint Mary Ellen Lewis counsel of record. (Filed by Magistrate n) (cja vch no 0885350) [98-56455] (rei) [98-56455]

3/17/99 Received copy of District Court order filed on 3/10/99 appoint Lisa M. Bassis counsel of record. (Filed by Magistrate n) (CJA VCH NO. 0885362.) [98-56455] (rei) [98-56455]

9/23/99 Filed Appellant Richard Herman Ford's motion to

modify deadlines; declaration; served on 9/22/99. (TO MOATT PER PROMO [98-56455] (ca) [98-56455]

3/30/00 Filed order MOATT (Deputy Clerk: JT) It has recently come to the court's attention that, on 9/23/99, appellant moved to amend the briefing schedule for these appeals. Appellant's motion is GRANTED. Appellant's opening brief and excerpts of record are due 5/8/00; appellee's answering brief is due 6/7/00; and the optional reply brief is due within 14 days from service of the answering brief. The Clerk shall amend the docket for all of these appeals to reflect that Lisa M. Bassis, P.O. Box 691956, LA, CA 90069, (213)848-8733, is appt. counsel of record. [98-56455, 98-56587, 98-80477, 98-80582, 98-80603] (ca) [98-56455 98-56587 98-80477 98-80582 98-80603]

12/13/00 Referred to staff attorney (moatt) re: no response to default order [98-56587, 98-56455, 98-80477, 98-80582, 98-80603] (cb) [98-56455 98-56587 98-80477 98-80582 98-80603]

12/18/00 Received original and 15 copies of appellant's opening brief of 35 pages and 7 excerpts of record in 2 volumes; served on 12/15/00. (Informal: n) Deficient late and in default. Notified Counsel. [98-56455] (ca) [98-56455]

1/4/01 Filed Appellant Richard Herman Ford's motion for relief from default; served on 12/23/00. (MOATT) [98-56455] [98-56455] (ca) [98-56455]

2/26/01 Filed order MOATT (Appellate Commissioner) Appellant's "motion to compel filing of appellant's opening brief and excerpts of record nunc pro tunc" is construed as a motion for relief from default. So construed, the motion is granted. The clerk shall file the opening brief and excerpts of record received on 12/18/00. Appellee's brief is due within 30 days after the date of this order. Appellant's optional reply brief is due within 14 days after service of the appellee's

brief. [98-56455, 98-56587, 98-80477, 98-80603] (ca) [98-56455 98-56587 98-80477 98-80603]

2/26/01 Filed original and 15 copies of Appellant Richard Herman Ford's opening brief in 98-56455 of 35 pages and 7 excerpts of record in 2 volumes; served on 12/15/00.(Informal: n) [98-56455, 98-56587, 98-80477, 98-80603] (ca) [98-56455 98-56587 98-80477 98-80603]

3/30/01 Filed Appellee's motion to strike portions of Appellant's excerpts of record; served on 3/27/01. (MOATT) (ca) [98-56455]

3/30/01 Filed original and 15 copies of Appellee's answering brief of 40 pages; served on 3/27/01. [98-56455, 98-56587, 98-80477, 98-80603] (ca) [98-56455 98-56587 98-80477 98-80603]

4/11/01 14 day oral extension by phone of time to file Appellant Richard Herman Ford in 98-56455, Appellant Richard Herman Ford in 98-56331, Appellant Richard Herman Ford in 98-56587, Petitioner Richard Herman Ford in 98-80477, Petitioner Richard Herman Ford in 98-80582, Petitioner Richard Herman Ford in 98-80603's reply brief. [98-56455, 98-56331, 98-56587, 98-80477, 98-80582, 98-80603] appellants' reply brief due 4/27/01 in 98-56455, in 98-56331, in 98-56587, in 98-80477, in 98-80582, in 98-80603; (terr) [98-56331 98-56455 98-56587 98-80477 98-80582 98-80603]

5/24/01 Filed original and 15 copies of Appellant Richard Herman Ford's reply brief of 26 pages; served on 5/23/01. (Informal: n) [98-56455, 98-56587, 98-80477, 98-80582, 98-80603] (ca) [98-56455 98-56587 98-80477 98-80582 98-80603]

5/24/01 Filed Appellant Richard Herman Ford's opposition to respondent's motion to strike portions of appellants excerpts of record; served on 5/23/01. (MOATT) [98-56455, 98-56587, 98-80477, 98-80582,

98-80603] (ca) [98-56455 98-56587 98-80477 98-80582 98-80603]

5/24/01 Filed Appellant Richard Herman Ford's motion for relief and to accept appellant's brief; served on 5/23/01. (MOATT, brief already filed) [98-56455, 98-56587, 98-80477, 98-80582, 98-80603] [98-56455, 98-56587, 98-80477, 98-80582, 98-80603] (ca) [98-56455 98-56587 98-80477 98-80582 98-80603]

7/19/01 Filed order MOATT (Deputy Clerk: ML) Appellee's motion to strike portions of the excerpts of record is referred to the panel that will decide the merits of this appeal. Appellant's motion for relief is denied as unnecessary. This case is ready for calendering. [98-56455, 98-56587, 98-80477, 98-80582, 98-80603] (ca) [98-56455 98-56587 98-80477 98-80582 98-80603]

8/8/01 Calendar check performed [98-56455, 98-56587, 98-80477, 98-80582, 98-80603] (aw) [98-56455 98-56587 98-80477 98-80582 98-80603]

8/20/01 Calendar materials being prepared. [98-56455, 98-56587, 98-80477, 98-80582, 98-80603] [98-56455, 98-56587, 98-80477, 98-80582, 98-80603] (aw) [98-56455 98-56587 98-80477 98-80582 98-80603]

8/28/01 CALENDARED: PASA Nov 6 2001 9:00 am Courtroom 2 [98-56455, 98-56587, 98-80477, 98-80582, 98-80603] (aw) [98-56455 98-56587 98-80477 98-80582 98-80603]

10/9/01 FILED CERTIFIED RECORD ON APPEAL: 1 CLERKS REC (ORIG.) [98-56455] (jk) [98-56455]

10/25/01 Filed Respondent's additional citations; served on 10/23/01. (PANEL) [98-56455, 98-56587, 98-80477, 98-80582, 98-80603] (ca) [98-56455 98-56587 98-80477 98-80582 98-80603]

11/6/01 ARGUED AND SUBMITTED TO Harry PREGERSON, Stephen R. REINHARDT, Barry G. SILVERMAN [98-56455, 98-56587, 98-80477, 98-80582, 98-80603] (pg) [98-56455 98-56587 98-80477 98-80582 98-80603]

6/10/02 Filed order (Harry PREGERSON, Sidney R. THOMAS, Barry G. SILVERMAN) Submission of these cases is hereby vacated. The cases will be held pending the Supreme Court's decision in Saffold v. Newland, 250 F. 3d 1262 (9th Cir. 2000), cert. granted, 122 S. Ct. 393 (2001) (No.01-301). [98-56455, 98-56587, 98-80477, 98-80582, 98-80603] (ca) [98-56455 98-56587 98-80477 98-80582 98-80603]

7/3/02 Filed order (Harry PREGERSON, Stephen R. REINHARDT, Barry G. SILVERMAN): The ct directs the parties to file supplemental briefs on the following issues: (1) Whether the dc, when it dismissed Ford's first federal habeas petition, abused its discretion by failing to consider sua sponte whether to stay the proceedings and hold the exhausted claims in abeyance while Ford attempted to exhaust his unexhausted claims? (cite) (2) What, if any, obligation the dc had to inform Ford at the time that it dismissed his first federal habeas petition without prejudice that, under AEDPA, absent equitable tolling, he would be time-barred on all of his claims should he opt to return to the state courts to exhaust his unexhausted claims rather than choosing to proceed with the exhausted claims and dismiss the unexhausted claims? The supplemental briefs shall be no longer than 7000 words and shall be filed with the Clerk of the Court within 21 days of the date of this order. Copies shall also be delivered to the chambers of the panel judges on or before the filing date: (see casefile for judges addresses). [phone/file Faxed Panel] [98-56455, 98-56587, 98-80477, 98-80582] (je) [98-56455 98-56587 98-80477 98-80582]

7/22/02 Filed Lisa M. Bassis in 98-56455, in 98-56587, in 98-80477, in 98-80582, in 98-80603's CJA voucher and affidavit of Lisa M. Bassis in support of interim payment of attys fees and cost under CJA; served on 7/1/02. (commissioner) (dr) [98-56455 98-56587 98-80477 98-80582 98-80603]

7/23/02 Filed an original and 15 copies of Appellee Daniel E. Lungren's supplemental appellee's brief of 22 pages; served on 7/22/02. (PANEL via FEDEX) [98-56455] (ca) [98-56455]

7/30/02 Filed an original and 15 copies of Appellant Ford's supplemental brief of 19 pages; served on 7/19/02. (PANEL via fedex) [98-56455, 98-56587, 98-80477, 98-80582, 98-80603] (ca) [98-56455 98-56587 98-80477 98-80582 98-80603]

9/6/02 FILED OPINION: AFFIRMED IN PART, VACATED IN PART AND REMANDED WITH INSTRUCTIONS. (Terminated on the Merits after Oral Hearing; Remanded; Written, Signed, Published. Harry PREGERSON; Stephen R. REINHARDT, author; Barry G. SILVERMAN, dissenting.) FILED AND ENTERED JUDGMENT. [98-56455, 98-56587, 98-80477, 98-80582, 98-80603] (ca) [98-56455 98-56587 98-80477 98-80582 98-80603]

9/19/02 Filed an original and 50 copies of Appellee Daniel E. Lungren's petition for rehearing with suggestion for rehearing en banc of 23 pages; served on 9/18/02. (PANEL AND ALL ACTIVE JUDGES) [98-56455, 98-56587, 98-80477, 98-80582, 98-80603] (ca) [98-56455 98-56587 98-80477 98-80582 98-80603]

9/24/02 Filed order (Harry PREGERSON, Stephen R. REINHARDT, Barry G. SILVERMAN) Petitioner-Appellant shall file a response to Respondents-Appellee's petition for rehearing with suggestion for rehearing en banc. Fifty copies of said response shall be filed within 21 days of the filed date of this order. [98-56455, 98-56587, 98-80477,

98-80582, 98-80603] (ca) [98-56455 98-56587 98-80477 98-80582 98-80603]

10/4/02 Filed Appellant Richard Herman Ford's motion to extend time in which to file response to respondent/appellee's petition for rehearing; served on 10/03/02. (PANEL) [98-56455, 98-56587, 98-80477, 98-80582, 98-80603] (ca) [98-56455 98-56587 98-80477 98-80582 98-80603]

10/7/02 Filed order (Harry PREGERSON, Stephen R. REINHARDT, Barry G. SILVERMAN) Petitioner-Appellant's motion to extend time until 11/11/02 to file response to respondent-Appellee's petition for rehearing is granted. (phoned parties, faxed panel) [98-56455, 98-56587, 98-80477, 98-80582, 98-80603] (ca) [98-56455 98-56587 98-80477 98-80582 98-80603]

10/25/02 Filed Daniel E. Lungren's additional citations, served on 10/23/02. (PANEL and all active judges) [98-56455, 98-56331, 98-56587, 98-80477, 98-80582, 98-80603] (ca) [98-56331 98-56455 98-56587 98-80477 98-80582 98-80603]

11/14/02 Received Appellant's response to appellee's petition for rehearing and suggestion for rehearing en banc; served on 11/11/02. Deficient: late, motion on its way from counsel. (PANEL AND ALL ACTIVE JUDGES) [98-56455, 98-56587, 98-80477, 98-80582, 98-80603] (ca) [98-56455 98-56587 98-80477 98-80582 98-80603]

11/29/02 Filed Appellant Richard Herman Ford's motion to file late court ordered response to respondent's petition for rehearing; served on 11/27/02. (PANEL) [98-56455, 98-56587, 98-80477, 98-80582, 98-80603] (ca) [98-56455 98-56587 98-80477 98-80582 98-80603]

12/3/02 Filed order (Harry PREGERSON, Stephen R. REINHARDT, Barry G. SILVERMAN) Appellant's

motion to extend time in which to file a response to appellee's petition for rehearing and suggestion for rehearing en banc is granted. [98-56455, 98-56587, 98-80477, 98-80582, 98-80603] (ca) [98-56455 98-56587 98-80477 98-80582 98-80603]

12/3/02 Filed Appellant Richard Herman Ford's response to appellee's petition for rehearing and suggestion for rehearing en banc of 11 pages; served on 11/11/02. [98-56455, 98-56587, 98-80477, 98-80582, 98-80603] (ca) [98-56455 98-56587 98-80477 98-80582 98-80603]

1/14/03 Filed order (Harry PREGERSON, Stephen R. REINHARDT, Barry G. SILVERMAN): The parties are directed to file supplemental briefs of no longer than fifteen (15) pages addressing the effect of Valerio v. Crawford, (cite) and Kelly v. Small, (cite) on this case. The briefs shall be filed within fourteen (14) days from the date of this order with the Clerk of the Ct and shall also be delivered to chambers of the panel judges on or before the filing date: Chambers of Judge Pregerson, Chambers of Judge Reinhardt, Chambers of Judge Silverman. [phone/file Faxed Panel and Csl of record] [98-56455, 98-56587, 98-80477, 98-80582, 98-80603] (je) [98-56455 98-56587 98-80477 98-80582 98-80603]

1/28/03 Filed original and 15 copies of respondent/Appellee's supplemental brief of 5 pages, served on 1/27/03. (PANEL via FEDEX) [98-56455, 98-56587, 98-80477, 98-80582, 98-80603] (ca) [98-56455 98-56587 98-80477 98-80582 98-80603]

2/3/03 Filed original and 15 copies of petitioner Fords' supplemental brief of 11 pages; served on 1/27/03. (PANEL via FEDEX) [98-56455, 98-56587, 98-80477, 98-80582, 98-80603] (ca) [98-56455 98-56587 98-80477 98-80582 98-80603]

5/15/03 Filed order and amended opinion (Judges Harry PREGERSON, Stephen R. REINHARDT, Barry G.

SILVERMAN,) (Orig. opinion id:) denying petition for enbanc rehearing [4535744-1] in 98-56455, 98-56587, 98-80477, 98-80582, 98-80603 [98-56455, 98-56587, 98-80477, 98-80582, 98-80603] (ca) [98-56455 98-56587 98-80477 98-80582 98-80603]

5/21/03 Filed respondent's motion for stay of mandate; served on 5/19/03. (PANEL) (ca) [98-56455 98-56587 98-80477 98-80582 98-80603]

5/28/03 Filed order (Harry PREGERSON, Stephen R. REINHARDT, Barry G. SILVERMAN) Resps-Aples' mtn for a 90-day stay of the issuance of the mandate pending application for writ of cert is granted. Therefore, it is ordered that the mandate is stayed for 90 days pending the resps-aples' potential filing of a petition for writ of cert in the SC. If such a petition is filed, & if the writ of cert is granted by the SC, the stay shall continue until final disposition by the SC. [4744163-1] [98-56455, 98-56587, 98-80477, 98-80582, 98-80603] (ea) [98-56455 98-56587 98-80477 98-80582 98-80603]

8/21/03 Received Paul M. Roadarmel for Appellee Daniel E. Lungren in 98-56455 letter dated 8/19/03 re: petition for writ of cert. was filed on 8/11/03 in the supreme court, fyi, in response to the court granting stay of the mandate on 5/28/03. [98-56455, 98-56587, 98-80477, 98-80582, 98-80603] (ca) [98-56455 98-56587 98-80477 98-80582 98-80603]

9/8/03 Received notice from Supreme Court: petition for certiorari filed Supreme Court No. 03-221. filed on 8/12/03. [98-56455, 98-56587, 98-80477, 98-80582, 98-80603] (ca) [98-56455 98-56587 98-80477 98-80582 98-80603]

Richard Herman Ford E-10539
Name
CSP-Sacramento A-3-224
P.O. Box 290066
Represa, CA 95671-0066
ADDRESS or PLACE of CONFINEMENT
and PRISON NUMBER

Note: It is your responsibility to notify the Clerk of Court in writing of any change.

Note: *If represented by an attorney,his name, address & Telephone number.*

FILED
CLERK U.S. DISTRICT COURT
MAY - 5 1997
CENTRAL DISTRICT
OF CALIFORNIA
BY CLERK

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT

PETITION FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

RICHARD HERMAN FORD
FULL NAME INCLUDE NAME UNDER WHICH YOU WERE CONVICTED

Petitioner,

vs.

S. HUBBARD, WARDEN (A) CSP-SAC
NAME OF WARDEN, SUPERINTENDENT JAILOR, or AUTHORIZED PERSON having custody of petitioner

Respondent.

and

ATTORNEY GENERAL OF THE STATE OF CALIFORNIA
Daniel Lungren
Additional Respondent.

CASE NO.CV97-3385RAP(SH)

To be supplied by the Clerk of the United States District Court

PETITION FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

LODGED
CLERK, U.S. DISTRICT COURT
APR 25 1997
CENTRAL DISTRICT OF CALIFORNIA

(If petitioner is attacking a judgment which imposed a sentence to be served in the *future*, petitioner must fill in the name of the state where the judgment was entered. If petitioner has a sentence to be served in the *future* under a federal judgment which he wishes to attack, he should file a motion under 28 U.S.C. § 2255, in the federal court which entered the judgment.)

INSTRUCTIONS – READ CAREFULLY

This petition shall be legibly handwritten or typewritten, and signed by the petitioner, under penalty of perjury. You must forth CONCISELY the answer to each question in the proper space on the form. Any false statement of material may serve as the basis for prosecution and conviction for perjury.

You must not attach separate pages to this petition, except that *ONE* separate additional page is permitted in answering Question No. 10.

Upon receipt of a fee of $5.00 you petition will be filed if it is in proper order.

If you are seeking leave to proceed *in forma pauperis* (without paying the $5.00 filing fee and other court costs), then you must also execute the declaration on the last page, setting forth information which establishes your inability to pay the fees and costs of the proceedings or to give security therefor. If you wish to proceed in forma pauperis, you must have an authorized officer at the penal institution complete the certificate as to the amount of money and securities on deposit to your credit in any account in the institution. If your prison account exceeds $*25.00*, you must pay the filing fee as required by the rule of the district court.

When the petition is completed, the original and two copies must be mailed to the Clerk of the United States District Court for the Central District of California, United States Courthouse, 312 North Spring Street, Los Angeles, California 90012. ATTN: Intake/Docket Section.

Only one sentence, conviction or parole matter may be challenged in a single petition. If you challenge more than one, you must do so by separate petitions.
Petitions which do not conform to these instructions will be returned with a notation as to the deficiency.

PLEASE COMPLETE THE FOLLOWING: (Check appropriate number)

This petition concerns:

1. __X__ A conviction.

2. _____ A Sentence.

3. _____ Jail or prison conditions.

4. _____ Prison discipline.

5. _____ A parole problem.

6. _____ Other.

PETITION

1. Place of detention California State Prison-Sacramento, Represa, California

2. Conviction on which the petition is based (a separate petition must be filed for each conviction being attacked).

a. Nature of offense involved (include all counts) Conspiracy to Commit Murder, Attempted Murder w/Firearm, Administering Stupefying Drugs, Robbery, Conspiracy to Commit Robbery w/Arming, Great Taking Enhancement, False Imprisonment, Assault with Firearm.

b. Penal or other code section or sections PC §§182/187, 664/187, 12022(A), 222, 211, 182/211, 12022.5, 12022.6, 236, 12022(A), 12055.5, 245(A)(2).

c. Name and location of sentencing court Los Angeles Superior Court - Central District, 111 N. Hill St., Los Angeles, CA 90012-3117

d. Case Number Superior Court No. A392422; Court of Appeal No. B033751.

e. Date of Conviction January 6, 1988

f. Date of Sentence March 11, 1988

g. Length of sentence on each count 25-Life + 11 Years

h. Plea (check one)
(1) Not guilty (x) (2) Guilty ( ) (3) Nolo Contendere ( )

i. Kind of trial (check one)
(1) Jury (x) (2) Judge alone ( ) (3) Judge alone on transcript ( )

j. Did you testify at trial? Yes (x) No ( )

3. Did you appeal from the conviction of sentence?
Yes (x) No ( )

4. If you did appeal, give the following information for each appeal

a. (1) Name of Court California Court of Appeal, 2nd Appellate District, Division 7
(2) Result Conviction Affirmed- Petition for Rehearing Denied.
(3) Date of result October 9, 1992
(4) Citation or number of opinion 10 Cal. App. 4th 20; B033751
(5) Grounds raised (list each)
(a) Trial court erred in quashing Subpoena Duces Tecum issued by defense concerning freelance writer who 10 hours of taped interview with chief prosecution witness about case.
(b) Defense was unconstitutionally burdened re: balancing test freelance writer interests pursuant to DELANY.
(c) Trial court erred in not allowing evidence that prosecutor committed misconduct for instructing police to cease interviewing pros. wit. (impeachment).
(d) Trial court erred in not allowing appellant to present extrinsic evidence of third-party culpability.
(e) Trial court's refusal to allow details of significant evidence for benefit of co-defendant, hampered petitioner's defense.
(f) Failure to allow evidence of specific acts of misconduct in order to impeach prosecution's prime witness's credibility was error.
(g) Appellant joined in all issues raised by co-

appellant in his opening brief and incorporated all arguments therein.

b. (1) Name of Court California Supreme Court
(2) Result Petition for Review - Denied
(3) Date of result January 14, 1993
(4) Citation or number of opinion Same
(5) Grounds raise (list each) Same
(a)
(b)
(c)
(d)
(e)
(f)
(g)

5. If you did not appeal:

a. State your reasons
b. Did you seek permission to file a late appeal? Yes( )
No ( )

6. Other than a direct appeal, have you previously filed any petitions, applications or motions with respect to the conviction in any court, state or federal? Yes ( ) No (x)

7. If your answer to 6 was *YES* give the following information.

a. (1) Name of court
(2) Nature of proceeding
(3) Grounds raised
(4) Result
(5) Date of result
(6) Citation or number of any written opinions or orders entered pursuant to each such disposition.

b. (1) Name of court
(2) Nature of proceedings
(3) Grounds raised
(4) Result

(5) Date of result
(6) Citation or number of any written opinions or orders entered pursuant to each such disposition.

c. (1) Name of court
(2) Nature of proceedings
(3) Grounds raised
(4) Result
(5) Date of result
(6) Citation or number of any written opinions or orders entered pursuant to each such disposition.

8. Was an evidentiary hearing held? Yes ( ) No ( )
If so, state the name of the court, and the result

9. If you answer to 6 was *NO*, explain briefly why you did not seek post-conviction relief in the state courts. Petitioner is seeking relief in state courts, but due to extraordinary length of trials (5½ years), including one full year of suppression motions, petitioner has been able to fully prepare all issues to be presented to the court. Petitioner how files this writ in haste to meet new statute of limitations on federal habeas relief deadline of 4-23-97.

CAUTION: *Exhaustion Requirement:* In order to proceed in federal court you must ordinarily first exhaust your state court remedies as to each ground on which you request action by the federal court. This means that even if you have exhausted as to some grounds, you must first present all other grounds to the state court.

10. State *concisely* every ground on which you claim that you are being held unlawfully. Summarize *briefly* the facts supporting each ground. If necessary, attach a SINGLE page only behind this page.

CAUTION: If you fail to set forth all grounds in this petition, you may be barred from presenting additional ground at a later date.

a. Ground one Trial court errored in quashing Subpoena Duces Tecum issued by defense concerning freelance writer who had 10 hours of taped interview with chief prosecution witness about case.

Supporting *FACTS* (teil your story *BRIEFLY* without citing cases or law).

CAUTION: You must state facts not conclusions in support of your grounds. (e.g., if you are claiming incompetence of counsel you must state facts specifically setting forth what your attorney did or failed to do). A rule of thumb to follow is – who did exactly what to violate your rights at what time or place.

Freelance writer, Jan Golab, had ten hours of taped interviewed with People's chief witness, Bruce Adams. The court quashed Subpoena Duces Tecum to discover these recordings and denied petition the possibility of presenting evidence favorable to his claims at trial (i.e. that Bruce Adams was not credible witness). Petitioner was thus denied his right to a fair trial and to fully confront witnesses concerning relevant evidence to this case.

b. Ground Two Defense was constitutionally burdened re: balancing test of freelance writer's interests pursuant to DELANEY.

Supporting *FACTS* (tell you story *BRIEFLY* without citing cases or law).

Writer Golab stated his only interested in these tapes were pecuniary. Appellate attorney specigically stated in Appeal Brief, " . . . necessary to present it [in] order to preserve the issue for further review." (Appellant Ford's Opening Brief, page 40). Trial court disregarded Golab's pecuniary motives as irrevevant. Petitioner maintains position that his right to a fair trial is far paramount over a reporter's privilege, and the information would have assisted defense.

c. Ground Three Trial court errored in not allowing evidence that prosecutor committed misconduct for instructing police to cease interviewing prosecution witness (impeachment

Supporting *FACTS* (tell your story *BRIEFLY* without citing cases or law).

Deputy District Attorney, Robert Jorgensen, told police to stop taping their witness, as was usual policy for the police to do, because he did not want the information on tapes to come back to "haunt" him. Considering the facts of this case, and that the witness they were referring to was Bruce Adams, the district attorney was in essence deliberately suppressing possible exculpatory evidence from petitioner's defense, which he is mandated to do in accordance to petitioner's right to receiving a fair trial.

d. Ground Four Court errored in not allowing appellant to present extrinsic evidence of third-party culpability.

Supporting *FACTS* (tell your story *BRIEFLY* without citing cases or law).

The police concluded that from witness description, the persons responsible for the robbery petitioner was tried for, were done by the same suspects who had committed another robbery unrelated to petitioner's charge. These suspects were described as "possible Iranians or Middle Eastern" (with petitioner and co-defendant both being white). Trial court would not allow defense to present this to jury and violated petitioner's right to fair trial in so doing.

e. **Ground Five**: Trial court's refusal to allow details of significant evidence for benefit of co-defendant, hampered petitioner's defense.

Supporting FACTS: Trial court refused to allow

evidence of the details of petitioner's wife's rape. Trial court excluded tape recording of prosecution key witness, Adams, and victim Loguercio. Trial court elided all specific references to co-defendant, Von Villas. These three ruling by the trial court, when taken in context to the circumstance of the entire case, constituted an abuse of the discretion and precluded petitioner's right to a fair trial.

f. **Ground Six**: Failure to allow evidence of specific acts of misconduct in order to impeach prosecution's prime witness's credibility was error.

Supporting FACTS: After petitioner and co-defendant were arrested, prosecution's prime witness, Bruce Adams, became a "protected witness." During the time that Adams was protected witness, he was arrested for writing a check to himself under an alias on a defunct business account. Adams was released from jail to the custody of a police detective named Gaily. No charges were filed. These event occurred in Orange County which is significant because it was Los Angeles County police that pulled him out of jail. Later, Adams was arrested in Oxnard, which is in Ventura County, for auto theft and embezzlement, and again Los Angeles police (Sergeant Fox), retrieved him from jail there, and no charges were file. Petitioner was not allowed to give jury full measure of this information which would tend to impeach government's key witness, but also to suggest police credibility was in question. This ruling was erroneous to a constitutional magnitude when taken with all other evidentiary rulings made against petitioner, and resulted in petitioner being deprived a fair trial.

g. **Ground Seven:** Appellant joined in all issues raised by co-defendant in his opening brief and incorporated all argument therein.

Supporting FACTS: Petitioner is entitled to bring all viable federal issues that have been exhausted in State

court that were raised by co-defendant who had trial in front of a single jury. Those issues are:

1. Jury misconduct re: Jury foreman producing his own "spread sheet," and had used by entire jury.
2. Appellate review denied petitioner of fair trial for failing to supress general warrant so lacking in specificity and particularity, it violated rights guaranteed under fourth & fourteenth amendments.
3. Due process rights were denied by State's failure to preserve potentially favorable evidence.
4. Trial court prejudicially refused defense instructions re: Inferences to be drawn against People for loss of evidence seized pursuant to warrant.
5. Trial court erroneously refused to instruct that the jury had to be unanimous on each overt act of each conspiracy.

11. If any of the grounds listed in 10 were not previously presented to this court or any other court, state briefly which grounds were not so presented and give reasons. N/A

12. Do you have any petition, appeal or parole matter pending in any court, either state or federal as to the judgment of conviction under attack? Yes ( ) No (x)

13. Are you presently represented by counsel? Yes ( ) No (x)
If so, name, address and telephone number _____
Case name and court _____

THEREFORE, petitioner prays that the court grant petitioner relief to which he may be entitled in this proceedings.

_____
Signature of Attorney (if any)

I declare (or certify, verify, or state) under penalty of perjury

that the foregoing is true and correct. Executed on
April 19 1997
(Date)

/s/
Signature of Petitioner

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Richard Herman Ford E-10539
CSP-Sacramento A-3-224
P.O. Box 290066
Represa, cA 95671-0066

In Propria Persona

FILED
CLERK, U.S. DISTRICT COURT
MAY - 5 1997
CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

RICHARD HERMAN FORD,	)	Case No. 97-3385RAP(SH)
Petitioner,	)	MOTION TO STAY
vs.	)	FEDERAL HABEAS
	)	CORPUS PETITION
SUSAN HUBBARD, Warden (A)	)	CONTAINING
	)	EXHAUSTED GROUNDS
	)	WHILE PETITIONER
Respondent.	)	EXHAUSTS
	)	UNEXHAUSTED STATE
	)	CLAIMS ON STATE
		APPELLATE NO B033751

Petitioner, having duly filed a petition for Writ of Habeas Corpus in the above-entitled action pursuant to 28 U.S.C. § 2254, moves this court to stay said petition pursuant to Fetterly v. Paskett (9th Cir. 1993) 997 F.2d 1295, until petitioner can exhaust newly identified claims in state court and thereafter allow petitioner to amend said habeas petition.

Newly identified claims support, and are crucial to, federal petition. Unexhausted claims consist of:

1. Ineffective assistance of trial counsel. Counsel failed

to request exculpatory scientific test available to him.

2. Ineffective assistance of appellate counsel. Failed to bring above issue listed in 1.

3. Prosecutorial misconduct. Prosecution used informant/agent, Anthony Love, in constituionally unacceptable manner.

Petitioner advises court that due to haste to meet deadline imposed by Public Law 104-132-APR. 24, 1996, several additional meritorious issues beyond what has been stated in this motion may exist.

Petitioner also submits Declaration In Support of Motion to Stay Federal Writ, attached.

Dated: April 19 1997

/s/
RICHARD HERMAN FORD,
Petitioner In Propria Persona

I HEREBY CERTIFY THAT THIS DOCUMENT WAS SERVED BY FIRST CLASS MAIL, POSTAGE PREPAID, TO ALL COUNSEL(OR PARTIES) AT THEIR RESPECTIVE MOST RECENT ADDRESS OF RECORD IN THIS ACTION ON THIS DATE.
DATED 7-8-97
/s/
Deputy Clerk

FILED
CLERK, U.S. DISTRICT COURT
JUL - 7 1997
CENTRAL DISTRICT OF CALIFORNIA
BY /S/ DEPUTY

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA-
WESTERN DIVISION

RICHARD HERMAN FORD,	)	CV 97-3385-RAP(SH)
Petitioner,	)	ORDER RE FURTHER PROCEEDINGS ON A PARTIALLY EXHAUSTED PETITION
v.	)	
S. HUBBARD, WARDEN,	)	
Respondent.	)	

On May 5, 1997, petitioner, a prisoner in state custody, filed a Petition for Writ of Habeas Corpus (the "Petition") and a Motion to Stay Federal Habeas Corpus Petition Containing Exhausted Ground While Petitioner Exhausts Unexhausted State Claim on State Appellate No. B033751 (the "Motion"). Respondent filed an Answer on June 4, 1997, and then an Amended Answer on June 12, 1997, which addressed the merits of petitioner's Motion. The Court finds that petitioner has failed to exhaust Grounds 4 and 7 (subparts 1-4, inclusive) of the Petition.

A prerequisite to obtaining federal habeas corpus relief is the exhaustion of available state judicial remedies. 28 U.S.C. § 2254(b); Picard v. Connor, 404 U.S. 270, 275 (1971). "For reasons of federalism, 28 U.S.C. § 2254 requires federal courts to give the states an initial opportunity to correct alleged violations of its prisoners' federal rights." Duncan v. Henry, __ U.S. __, 130 L.Ed 2d 865, 868 (1995). Moreover, a federal court will not review a state prisoner's petition for writ of habeas corpus unless it appears that the prisoner has exhausted available state remedies on each and every claim presented. 28 U.S.C. § 2254(b), (c); Rose v. Lundy, 445 U.S. 509, 522 (1982).

A petitioner has satisfied the exhaustion requirement if: (1) he has "fairly presented" his federal claim to the highest state court with jurisdiction to consider it, Anderson v. Harless, 459 U.S. 4, 6 (1982); Picard, 404 U.S. at 275; or (2) he demonstrates that no state remedy remains available. Harmon v. Ryan, 959 F.2d 1457, 1460 (9th Cir. 1992); Kellotat v. Cupp, 719 F.2d 1027, 1029 (9th Cir. 1983); see 28 U.S.C. § 2254(c). In order to "fairly present", a prisoner must describe in the state court proceedings both the operative facts and the precise federal legal theory on which his claim is based. Duncan, 130 L.Ed 2d at 868; Anderson, 459 U.S. at 6.

The claims in federal court must be more than just "essentially the same." Johnson v. Zenon, 88 F.3d 828, 830 (1996).

Petitioner has three options:

1. The present Petition may be dismissed and Petitioner can present the issues framed in Grounds 4 and 7 (subparts 1-4, inclusive) of the Petition, to the California Supreme Court by way of habeas corpus. If relief is denied, a new Petition may be filed with this Court containing only issues that have been fully exhausted.

2. Petitioner can request that this Court now rule on all contentions except Grounds 4 and 7 (subparts 1-4, inclusive) of the Petition. If this Court rules on all of the grounds except 4 and 7 (subparts 1-4, inclusive), it will not later rule on these issues, even if Petitioner subsequently does exhaust these issues in review by the California Supreme Court. It is a matter of judicial economy to attempt to avoid piecemeal decisions.

3. Petitioner may establish, in his response to this Order, that he has in fact exhausted those issues in Grounds 4 and 7 (subparts 1-4, inclusive) of the Petition.

Petitioner shall file and serve within 18 days of the date of this Order a statement that petitioner either: (1) forever waives his right to assert Grounds 4 and 7 (subparts 1-4, inclusive), in the present habeas petition; or (2) establishes that these Grounds have been exhausted by habeas corpus review in the California Supreme Court.

If no written response is received, as set forth above, the Magistrate Judge will assume that Petitioner agrees to dismissal of the entire petition without prejudice and wishes to exhaust Grounds 4 and 7 (subparts 1-4, inclusive) before obtaining a ruling from this Court. If Petitioner elects to waive the contentions set forth in Grounds 4 and 7 (subparts 1-4, inclusive) or if petitioner can adequately demonstrate exhaustion of these issues the Court will then order a Return from Respondent on the merits.[1/]

Furthermore, a district court has discretion to Stay proceedings on a habeas petition containing only exhausted claims, in order to give Petitioner time to exhaust newly

---

1. This Court has received respondent's application for an extension of time to file its Return, filed on July 3, 1997. This Court will advise respondent at a later date if a Return on the merits becomes necessary in light of this Order.

discovered claims in state court before amending the federal habeas petition. Greenawalt v. Stewart, 105 F.3d 1268, 1274 (9th Cir. 1997) (per curiam), citing Fetterly v. Paskett, 997 F.2d 1295, 1301-02 (9th Cir. 1993), cert. denied, 513 U.S. 914 (1994); see also Calderon v. U.S. District Court (Gordon), 107 F.3d 756, 761 n.10 (9th Cir. 1997) (as amended per Order, April 16, 1997, 1997 WL 183877).

However, a federal habeas petition must be dismissed if it contains even one unexhausted claim. See Coleman v. Thompson, 501 U.S. 722, 731, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991); Castile v. Peoples, 489 U.S. 346, 349, 109 S.Ct. 1056, 103 L.Ed. 380 (1989); Rose v. Lundy, 455 U.S. 509, 522, 102 S.Ct. 1198, 71 L.Ed.2d 379 (1982).

In this case, the Petition contains both exhausted and unexhausted claims. As a result, this Court does not have the discretion to Stay such a petition.

It appears that petitioner moves for a Stay of proceedings based on the apprehension that otherwise he may be barred from filing a new federal habeas petition by the one-year statute of limitations imposed by 28 U.S.C. § 2244(d), as amended by Title 1, § 101 of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA" or "the Act"), Pub. L. 104-132, 110 Stat. 1214 (enacted April 24, 1996).

However, as respondent correctly notes, with respect to petitioner's new claims, the one-year statute of limitations period under the AEDPA begins to run only when the factual predicate of the claims could have been discovered through the exercise of due diligence. 28 U.S.C. § 2244 (d)(1)(D).

DATED: 7/7/97

/s/
STEPHEN J. HILLMAN
UNITED STATES MAGISTRATE JUDGE

R.H. FORD/E-10539
CSP/Sac. A-Facility
Box-290066
REPRESSA, Ca. 95671-0066

In Propria Persona

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA-
WESTERN DIVISION

R.H. FORD,
Petitioner,

Vs.

S. HUBBARD, WARDEN
Respondent
_____/

CV-97-3385-RAP-(SH)

RETURN TO COURT
ORDER Re.: FURTHER
PROCEEDINGS

And MOTION FOR
EXTENTION OF TIME

PETITIONER of the foregoing action hereby makes this RETURN to the District Court's Order, Re.: FURTHER PROCEEDINGS ON A PARTIALLY EXHAUSTED PETITION:

PETITIONER makes this instant RETURN to this District Court's ORDER and to give notice [of his intent to forego further proceeding in order to exhaust at issue elements of petition] and inquire [whether in agreeing to dismissal of petition WITHOUT PREJUDICE that the RETURN filed by RESPONDENT will be "accepted as true pursuant to 28 U.S.C. § 2248" as stated in this Court's ORDER, dated 5/12/97?] and to request an extention of time to respond to said RETURN in

the event that this Court's subsequent ORDER is not controlling.

Dated this 24 Day of July, 1997

/s/
R.H. FORD/ Pro Se

R.H. FORD /E-10539
CSP/Sac. A-Facility
Box-290066
Represa, Ca. 95671-0066

In Propria Persona

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA-
WESTERN DIVISION

R.H. FORD,
PETITIONER

Case No. CV-97-3385-RAP-(SH)

TRAVERSE TO RETURN

Vs

S. HUBBARD,
RESPONDENT

/

PETITIONER of the above titled action hereby makes this TRAVERSE to the RESPONDENT's RETURN on ORDER of this United States District Court and alleges the following:

1. That he is so detained at California State Prison/Sac. Co.;

2. That above said detension is the result of a judgement by a California Superior Court [case No. #A-392422] for the County of Los Angeles.

3. That said detension is not lawful nor proper due to numerous violations of Penal Code; Procedural Statutes;

State and Federal Constitution.

4. PETITIONER admits possible failure to exhaust several issues as a result of ineffective assistance of counsel and incomplete transcripts.

5. PETITIONER is of the belief that had he been accorded full scope of 'Rights' [from Cal. P.C. 1096], protections, Due Process and Effective Assistance of [state appointed] Counsel he would be ". . entitled to discharge from his present [duration of] confinment." That his present sentence and confinment is illegal and in violation the State and Federal Constitutions.

Accordingly, it is the PETITIONER's hope and request that any relief to which he may be entitled shall be granted by this District Court.

Dated this 24 Day of July , 1997 /s/
R.H. FORD/ Pro Se

VERIFICATION

I, PETITIONER, R.H. FORD, DECLARE UNDER PENALTY OF PERJURY THAT THE FOREGOING STATEMENTS ARE TRUE AND CORRECT EXCEPT AS TO THOSE MATTERS ALLEGED UPON INFORMATION AND BELIEF. AS TO THOSE MATTERS ALLEGED UPON INFORMATION AND BELIEF I BELIEVE THEM TO BE TRUE AND CORRECT. EXECUTED THIS ___ DAY OF JULY '97

/s/
R.H. FORD IN PROPRIA PERSONA

RICHARD HERMAN FORD/E-10539
Name
CSP/Sac. A-3-224
P.O. Box 290066
Represa, CA 95671-0066
ADDRESS or PLACE OF CONFINEMENT
and PRISON NUMBER

Note: It is your responsibility to notify the Clerk of Court in writing of any change.

Note: *If represented by an attorney, his name, address & Telephone number.*

FILED
CLERK U.S.
DISTRICT COURT
MAY - 5 1997
CENTRAL DISTRICT OF
CALIFORNIA
BY CLERK

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT

PETITION FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

RICHARD HERMAN FORD
FULL NAME INCLUDE NAME UNDER WHICH YOU WERE CONVICTED

Petitioner,

vs.

S. HUBBARD, Warden
(A) CSP-SAC
NAME OF WARDEN, SUPERINTENDENT JAILOR, or AUTHORIZED PERSON having custody of petitioner

Respondent.

and

ATTORNEY GENERAL OF THE STATE OF CALIFORNIA
Daniel Lungren
Additional Respondent.

CASE NO.CV97-3386JMI(SH)

To be supplied by the Clerk of the United States District Court

PETITION FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

LODGED
CLERK, U.S. DISTRICT COURT
APR - 25 1997
CENTRAL DISTRICT OF CALIFORNIA

(If petitioner is attacking a judgment which imposed a sentence to be served in the *future*, petitioner must fill in the name of the state where the judgment was entered. If petitioner has a sentence to be served in the *future* under a federal judgment which he wishes to attack, he should file a motion under 28 U.S.C. § 2255, in the federal court which entered the judgment.)

INSTRUCTIONS – READ CAREFULLY

This petition shall be legibly handwritten or typewritten, and signed by the petitioner, under penalty of perjury. You must forth CONCISELY the answer to each question in the proper space on the form. Any false statement of material may serve as the basis for prosecution and conviction for perjury.

You must not attach separate pages to this petition, except that *ONE* separate additional page is permitted in answering Question No. 10.

Upon receipt of a fee of $5.00 you petition will be filed if it is in proper order.

If you are seeking leave to proceed *in forma pauperis* (without paying the $5.00 filing fee and other court costs), then you must also execute the declaration on the last page, setting forth information which establishes your inability to pay the fees and costs of the proceedings or to give security therefor. If you wish to proceed in forma pauperis, you must have an authorized officer at the penal institution complete the certificate as to the amount of money and securities on deposit to your credit in any account in the institution. If your prison account exceeds $*25.00*, you must pay the filing fee as required by the rule of the district court.

When the petition is completed, the original and two copies must be mailed to the Clerk of the United States District Court for the Central District of California, United States Courthouse, 312 North Spring Street, Los Angeles, California 90012. ATTN: Intake/Docket Section.

Only one sentence, conviction or parole matter may be challenged in a single petition. If you challenge more than one, you must do so by separate petitions.
Petitions which do not conform to these instructions will be returned with a notation as to the deficiency.

PLEASE COMPLETE THE FOLLOWING: (Check appropriate number)

This petition concerns:

1. __X__ A conviction.

2. _____ A Sentence.

3. _____ Jail or prison conditions.

4. _____ Prison discipline.

5. _____ A parole problem.

6. _____ Other.

PETITION

1. Place of detention CALIFORNIA STATE PRISON-SACRAMENTO, Represa, CA

2. Conviction on which the petition is based (a separate petition must be filed for each conviction being attacked).

a. Nature of offense involved (include all counts) Conspiracy To Murder; Murder; Special Circumstance of Murder for Financial Gain.

b. Penal or other code section or sections PC §§182, 187, & 190.2(a)(1)

c. Name and location of sentencing court Los Angeles Superior Court, Northeast District - Van Nuys, 6230 Sylmar Avenue, Van Nuys, CA 91401.

d. Case Number Los Angeles No. A399663; Court of Appeal No. B041110

e. Date of Conviction October 11, 1988

f. Date of Sentence February 23, 1989

g. Length of sentence on each count 25-Life [Stayed (PC §182)]; Life Without Possibility of Parole [PC §§187, 190.2(a)(1)].

h. Plea (check one)
(1) Not guilty (x) (2) Guilty ( ) (3) Nolo Contendere ( )

i. Kind of trial (check one)
(1) Jury (x) (2) Judge alone ( ) (3) Judge alone on transcript ( )

j. Did you testify at trial? Yes (x) No ( )

3. Did you appeal from the conviction of sentence?
Yes (x) No ( )

4. If you did appeal, give the following information for each appeal

a. (1) Name of Court California Court of Appeal, 2nd Appellate District, Division 7
(2) Result Conviction Affirmed- Petition for Rehearing Denied.
(3) Date of result November 16, 1992
(4) Citation or number of opinion B041110
(5) Grounds raised (list each)
(a) Tape recording used in evidence was in violation of Constitutionally cognizable expectation of privacy.
(b) Seizure of recording exceeded scope of warrent.
(c) Warrent for tape recording obtained in violation of Title III, Omnibus Crime Act, 18 U.S.C. 2510 et seq.
(d) Tape recording was used in violation of protected marital privilege
(e) Subsequent judge changed original judge's ruling on PC §995 (People's "judge shopping") constituted abuse of discretion and fourteenth amend. violation
(f) Inaccurate ruling regarding "overt acts" among conspirators was misstatement of

law and amounted to abuse of judicial discretion.
(g) Abuse of discretion for refusal of juror instruction regarding unanimous ageement on specific overt act.
(h) Abuse of discretion by court in refusing impeachment of People's witness regarding felony conviction and hatred of LAPD where petitioner was employed.
(i) Abuse of discretion in allowing prejudicially misleading photograph into evidence.
(j) Instruction on motive was unsupported by the evidence and was prejudicially misleading.
(k) Instruction on admissions was ambiguous as worded and should not have been given.

b. (1) Name of Court California Supreme Court
(2) Result Petition for Review - Denied
(3) Date of result February 11, 1993
(4) Citation or number of opinion Same
(5) Grounds raise (list each) Same
(a)
(b)
(c)
(d)
(e)
(f)
(g)

5. If you did not appeal:

a. State your reasons
b. Did you seek permission to file a late appeal? Yes( )

No ( )

6. Other than a direct appeal, have you previously filed any petitions, applications or motions with respect to the conviction in any court, state or federal? Yes ( ) No (x)

7. If your answer to 6 was *YES* give the following information.

a. (1) Name of court
(2) Nature of proceeding
(3) Grounds raised
(4) Result
(5) Date of result
(6) Citation or number of any written opinions or orders entered pursuant to each such disposition.

b. (1) Name of court
(2) Nature of proceedings
(3) Grounds raised
(4) Result
(5) Date of result
(6) Citation or number of any written opinions or orders entered pursuant to each such disposition.

c. (1) Name of court
(2) Nature of proceedings
(3) Grounds raised
(4) Result
(5) Date of result
(6) Citation or number of any written opinions or orders entered pursuant to each such disposition.

8. Was an evidentiary hearing held? Yes ( ) No ( )
If so, state the name of the court, and the result

9. If your answer to 6 was *NO*, explain briefly why you did not seek post-conviction relief in the state courts. Due to

extraordinary length of trial [5½ years), petitioner's case involves approximately 252 volumes of transcripts and other documents (over 50,00 pages). The majority of these have not yet been forwarded to petitioner by appellate attorney. Petitioner has limited resources to investigate all pertinent issues and grounds, including new evidence in an already complex case, but continues to remain diligent in pursuing relief. Petitioner is allowed only one box of legal material in cell at a time, thus creating situation where work on case is extremely time consumming. Petitioner now files this writ in haste due to new time limits on federal habeas relief imposed by Public Law 104-132, of which grace period to file expires April 23, 1997.

CAUTION: *Exhaustion Requirement:* In order to proceed in federal court you must ordinarily first exhaust your state court remedies as to each ground on which you request action by the federal court. This means that even if you have exhausted as to some grounds, you must first present all other grounds to the state court.

10. State *concisely* every ground on which you claim that you are being held unlawfully. Summarize *briefly* the facts supporting each ground. If necessary, attach a SINGLE page only behind this page.

CAUTION: If you fail to set forth all grounds in this petition, you may be barred from presenting additional ground at a later date.

a. Ground one Tape recording used in evidence was in violation of constitutionally cognizable expectation of privacy.

Supporting *FACTS* (tell your story *BRIEFLY* without citing cases or law).

CAUTION: You must state facts not conclusions in support of your grounds. (e.g., if you are claiming incompetence of counsel you must state facts specifically setting forth what your attorney did or failed to do). A rule of thumb to follow is – who did exactly what to violate your rights at what time or place.

Tape recording of petitioner's visit with wife at jail was incomplete. It contained numerous gaps, and bits of phrases, taken and used out of context by prosecutors at trial. Conversation contained no mention of wrongdoing, which would have been plain had it been properly recorded. Petitioner had private conversation with wife, then State in essence created their own editing by claiming tape recorded only bits and pieces.

b. Ground Two Seizure exceeded scope of warrent.

Supporting *FACTS* (tell your story *BRIEFLY* without citing cases or law).

Warrant used for obtaining tape recording of jail visit of petitioner with wife referred to "future plans" of criminal activity. It made no authorization of seizure of information regarding past criminal conduct. Police and prosecutors used items designated on warrant as pretext for jailhouse recording which exceeded scope of warrant and violated petitioner's fourth amendment rights.

c. Ground Three Warrant for tape recording obtained in violation of Title III Omnibus Crime Act, 18 U.S.C.

§2510 et seq.

Supporting *FACTS* (tell your story *BRIEFLY* without citing cases or law).

Police did not adhere to federal mandates for electronic eavesdropping. Police failed to satisfy federal requirements regarding time limits, proper filing of supportive affidavit, and probable cause in obtaining, and subsequently using recording against petitioner at trial.

d. Ground Four Tape recording was used in violation of protected marital privilege.

Supporting *FACTS* (tell your story *BRIEFLY* without citing cases or law).

Tape recording at issue was between husband and wife, and, as such, is privileged and used against petitioner in violation of constitutional right to confidential communication. Petitioner recognizes that there are circumstances where confidentiality rights are outweighed by state's interests to protect citizens from harm, but given the specific issues of this recording, this was not the case.

e. **Ground Five:** Subsequent judge changed original judge's ruling on PC §995 motion (People's "judge shopping") constitutes abuse of discretion and fourteenth amendment violation.

Supporting FACTS: Two days after the People received adverse ruling on PC §995 motion, they exercised peremptory challenge (CCP §170.6) against judge who made ruling. Peremptory challenge was sustained. People then got subsequent judge to reverse first judge's ruling in violation of

petitioner's due process rights guaranteed under the fourteenth amendment.

f. **Ground Six**: Inaccurate ruling regarding "overt acts" among conspirators was misstatement of law and amounted to abuse of judicial discretion.

Supporting FACTS: The "overt acts" alleged by prosecution were not, by definition, overt acts at all, but rather "evidence" constituting a good portion of the prosecution's case. Trial court ruling constituted substantive abuse of conspiracy pleading serious enough to meet violation of due process standard.

g. **Ground Seven:** Abuse of discretion for refusal of juror instruction regarding unanimous agreement on specific overt act.

Supporting FACTS: Trial court ruled against defense request that jurors be instructed they must unanimously agree on the specific overt act that had been committed. After trial court rejected defense's request for such an instruction, court then instructed expressly on the converse principle resulting in error of magnitude requiring reversal of at least the conspiracy conviction.

h. **Ground Eight:** Abuse of discretion by court in refusing impeachment of People's witness regarding felony conviction and hatred of LAPD where petitioner was employed.

Supporting FACTS: People's witness, Darlis Chefalo, allegedly had a child raped by LAPD officiers, and a series of arrests for offenses including burgary, heroin, assault with a deadly weapon, and aggravated assault which occurred between

1959 and 1977 (with the events she testified to having occurred in 1982). Court ruled against allowing the underlying reasons for her hatred of the LAPD, and in so doing violated petitioner's right under sixth amendment right of confrontation, given the circumstances of this case.

i. **Ground Nine:** Abuse of discretion in allowing prejudicially misleading photograph into evidence.

Supporting FACTS: A newspaper photograph was found in desk of prosecution's prime witness that showed petitioner and co-defendant huddled together in conference that had been taken in a courtroom on an unrelated charge. This photograph was shown to the jury, and in the context of this particular case, it evinced an aura of conspiracy, which was what the prosecutor was attempting to prove against petitioner. This photograph was prejudicially misleading and violated petitioner's right to a fair trial.

j. **Ground Ten:** Instruction on motive was unsupported by the evidence and was prejudicially misleading.

Supporting FACTS: Court instructed jury with CALJIC No. 2.51, dealing with motive. There was no specific evidence presented from prosecutor that petitioner had a specific motive collateral to that inherent in the allegation of murder for financial gain, which would be universally applicable to anyone so charged. Therefore, instruction was unjustified and prejudicially misleading to petitioner's jury to the extent constituting reversible error.

k. **Ground Eleven**: Instruction on admissions was ambiguous as worded and should not have been given.

Supporting FACTS: Trial court instructed jury with slightly modified CALJIC No. 2.71, concerning admissions made by petitioner on jailhouse tape. The wording of this instruction suggested to the jurors that their only function was to determine whether or not statements constituting admissions were in fact said by petitioner. The fact that it was petitioner's voice on tape recording was not in controversy, and instruction served to obscure juror's function of determining whether statements concededly made by petitioner actually constituted "admissions"

l. **Ground Twelve**: All applicable issues raised by co-defendant.

11. If any of the grounds listed in 10 were not previously presented to this court or any other court, state briefly which grounds were not so presented and give your reasons. N/A

12. Do you have any petition, appeal or parole matter pending in any court, either state or federal as to the judgment of conviction under attack? Yes ( ) No (x)

13. Are you presently represented by counsel? Yes ( ) No(x)

    If so, name, address and telephone number _____

    Case name and court _____

WHEREFORE, petitioner prays, that the court grant petitioner

relief to which he may be entitled in this proceeding.

_____
Signature of Attorney (if any)

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on
April. 19. 1997
(Date)

/s/_____
Signature of Petitioner

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Richard Herman Ford E-10539
CSP-Sacramento A-3-224
P.O. Box 290066
Represa, CA 95671-0066

FILED
CLERK, U.S. DISTRICT COURT

MAY - 5 1997

CENTRAL DISTRICT OF CALIFORNIA

BY DEPUTY

In Propria Persona

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

RICHARD HERMAN FORD,	)	Case No. 97-3386-JMI
Petitioner,	)	MOTION TO STAY FEDERAL HABEAS CORPUS PETITION CONTAINING EXHAUSTED GROUNDS WHILE PETITIONER EXHAUSTS UNEXHAUSTED CLAIMS ON STATE APPELLATE NO. B041110
VS	)	
SUSAN HUBBARD, Warden, (A)	)	
Respondent.	)	

Petitioner, having duly filed a petition for Writ of Habeas Corpus in the above-entitled action pursuant to 28 USC §2254, moves this court to stay said petition pursuant to Fetterly v. Paskett (9th Cir. 1993) 997 F.2d 1295, until petitioner can exhaust newly identified claims in state court and thereafter allow petitioner to amend said habeas petition.

Newly identified claims support, and are crucial to, federal petition. Unexhausted claims consist of:

1. Discovery, subsequent to trial, that prosecution's motion main witness, Jan Ogilvie, was heavily drugged throughout trial and testimony against petitioner.

2. Discovery, subsequent to trial, that Ogilvie has recanted incriminating testimony against petition, and has stated that she never would have testified the way she did had she not bee "forcibly medicated" to the point of not being able to make coherent decisions.

3. Ineffective assistance of appellate counsel for failing to exhaust all viable issues in the record. Specifically, petitioner's constitutional rights were violated by the manner and use of known "agent," Anthony Love. There is evidence to indicate that informant Love was actually fed information about petitioner by police, who then altered Love's jail custody so that he could be, and was, place near to petitioner, and then directed by police to regurgitate previously fed information back at trial during testimony against petition as if it was information given to Love by petitioner.

Petitioner advises court that due to haste to meet the April 23, 1997, statute of limitations deadline for federal habeas corpus petitions, petitioner may have missed additional issues beyond what is mentioned in this motion.

Petitioner also submits Declaration In Support of Motion to Stay Federal Writ, attached.

DATED: APRIL 19 1997

/s/
RICHARD HERMAN FORD, Petitioner
In Propria Persona

R.H. Ford/E-10539
CSP/Sac. A-Facility
Box - 290066
Repressa, Ca. 95671-0066

In Propria Persona

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA-

WESTERN DIVISION

R.H. FORD,	CV-97-3386-RAP-(SH)
PETITIONER	PETITIONER's RETURN TO RESPONDENT's ANSWER
Vs.	
S. HUBBARD, WARDEN	
RESPONDENT. /	

PETITIONER of the foregoing action hereby makes this RETURN to the RESPONDENT's ANSWER pursuant to an ORDER of this United States District Court.

Petitioner would first direct this Court's attention to Respondent's ANSWER and its MEMORANDUM OF POINTS AND AUTHORITIES: PETITIONER does not concede that the ". . MOTION is being filed. . in an attempt to avoid the statute of limitations imposed by 28 USC § 2244(D)." PETITIONER submitted the MOTION pursuant to 28 USC § 2254 et seq. and belief that California Penal Code, Section 1473

(b) et seq. is the correct course and procedure.

In accordance with above said statutes, the "newly identified" claims are derivative of newly discovered evidence which PETITIONER has attempted to develop [See EXHIBITS - A etc.] prior to exhaustion of said claims which he is now seeking a fair hearing [SEE EXHIBIT – B]. As of this date, in the vacuume of each appointed appellate functionary, he has been unable to secure affidavits which he believes is prerequisite to any real consideration of his allegations of newly discovered evidence and violation of his state and Federal Constitutional rights that he now seeks relief from.

Additionally, PETITIONER is of the belief – and has been so advised – that no such petition of like complexity could receive an adequate and fair hearing unless it is considered in toto. Unfortunately, the PETITIONER's present circumstance almost precludes comportment with respect to litigious skills or practical experience in state or Federal venues. Furthermore, however it may be that the PETITIONER is neither a "Terrorist" nor under threat of death penalty, he would have brought the entire matter to this Federal District Court in due course. . . but for the enactment of the "AEDPA", which he was led to believe would bar him from any further Habeas Corpus relief if he did not submit the at issue petition now.

PETITIONER does concede that his petitions are indeed 'mixed' – although not by his choice nor as a result of lack of due diligence – but this is the result of a lack of consistant, qualitative/qualified legal counsel and representation that he has thus far been unable to satisfactorily secure himself. He likewise concurs with the Deputy Attorney General's observation with respect to 28 USC § 2244(d)(1)(D) and its application to PETITIONER's allegation of "newly identified" claims except that in the matter of the instant petition, numbered CV 97-3386, it would be considered sans a critical element . . : specifically that the former spouse – who was the sole witness

to allege that the PETITIONER had discussed [i.e. "overt acts"] and agreed to cause the disappearence or murder – of the alleged [no corpus deliciti; no 'crime scene' or evidence of "murder" was proven] victim [for money]. . . .now says [after years of detoxification, if not soul-searching] that (1) no such "discussion" ever occurred; (2) that no money was ever paid to the PETITIONER; and (3) that agents of the Los Angeles County, district attorney, (a) held her in proximate incommunicado; (b) whereat she was forced to submit to involuntary 'medication' with psychotropic drugs; (c) physically abused; and (d) coerced [under threat of "Death Penalty"] to plead to a reduced degree of murder [as well as implicating the PETITIONER in a conspiratorial relationship and an alleged contractural agreement to committ murder for money] as a precondition for exemption from 'special circumstances'. [see EXHIBIT-B]

The PETITIONER has always maintained that the conviction for which he is presently suffering resulted from 'guilt by association and circumstantial evidence which was utilized by informants to obscure their responsibility and/or mitigate criminal activity [by cooperating with politically motivated district officials]. This is not a matter of conjecture, but rather – only in the absence of fundamental [equal] protections (e.g. Cal. Penal Code, Sec. 1096), due process of law and effective assistance of counsel – a matter of fact which will become evident upon actual inquiry or examination of evidence – and lack thereof . . .

In any case, it is not the PETITIONER's intent to bother this Court with litany of excuses or rationalize his exemption from a reasonable and Constitutionally just statute of limitations. But, since the 'newly discovered evidence' falls within subsections of both state and Federal statutes, he believes – and will attempt to establish by litigation [in accordance with Constitutional provisions, Article-I, Sec. 9 Subpara. (3)] or exhaustion – that he is to return to this jurisdiction. Indeed, in

spite of the potential cause for prejudice, to some extent this seems to be the intent of this Court by its "GENERAL ORDER" transfering CV-97-3386-JMI to the calendar of Judge R.A. Paez, in combination with CV-97-3385-RAP-(SH) . . .

Accordingly, it is the PETITIONER'S belief that the less troublesome and equitable course would be for this District Court to STAY the proceedings, pending the resolution of the exhibited state petition for writ of habeas corpus [within the meaning of 28 USC § 2244(d)(1)(D)] – which the state [deputy] attorney general has now been served . . . In the alternative, PETITIONER requests that this petition be summarily 'DISMISSED WITHOUT PREJUDICE' – in which case, all parties having been notified and served shall return in due course – unless, in doing so, he will be procedurally barred . . . . In which case he has no choice but to proceed. . .

PETITIONER of the foregoing cause of action hereby declares under penalty of perjury that the foregoing is true and correct based upon his information or belief.

DATED THIS 10 DAY OF July, 1997

/s/
R.H. FORD
PRO SE

I HEREBY CERTIFY THAT THIS DOCUMENT WAS SERVED BY FIRST CLASS MAIL, POSTAGE PREPAID, TO ALL COUNSEL (OR PARTIES) AT THEIR RESPECTIVE MOST RECENT ADDRESS OF RECORD IN THIS ACTION ON THIS DATE
DATED: 8-4-97
/s/
DEPUTY CLERK

FILED
CLERK, U.S. DISTRICT COURT
AUG – 4 1997
CLERK, CENTRAL DISTRICT OF CALIFORNIA
BY CLERK

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA-

WESTERN DIVISION

RICHARD HERMAN FORD, Petitioner	)	CV 97-3386-JMI (SH)
v.	)	ORDER RE FURTHER PROCEEDINGS ON A PARTIALLY EXHAUSTED PETITION
S. HUBBARD, WARDEN Respondent.	)	

On May 5, 1997, petitioner, a prisoner in state custody, filed a Petition for Writ of Habeas Corpus in this Court, raising twelve claims. On May 5, 1997, petitioner also filed a Motion to Stay Federal Habeas Corpus Petition Containing Exhausted Grounds While Petitioner Exhausts Unexhausted State Claims on State Appellate No. B041110 (the "Motion"). Respondent

filed an Answer on May 30, 1996, arguing that this Court should not Stay the Petition because a Stay a) would violate the rule requiring dismissal of mixed petitions, and b) would allow petitioner to circumvent the statute of limitations in 28 U.S.C. § 2244(d). In respondent's Return filed June 20, 1997, respondent reiterates that petitioner has failed to exhaust state remedies with respect to Grounds 2, 3 and 8 through 12, inclusive, of the Petition.

On July 15, 1997, petitioner filed "Petitioner's Return to Respondent's Answer" ('Petitioner's Return") and a "Traverse to Return with Memorandum of Points/Authorities" (the "Traverse"). In Petitioner's Return, petitioner asks this Court to Stay the instant Petition or, in the alternative, dismiss the Petition without prejudice. However, in the Traverse, petitioner concedes that he has failed to exhaust several grounds, but petitioner indicates that he would like to proceed on those grounds that are "actionable".

A prerequisite to obtaining federal habeas corpus relief is the exhaustion of available state judicial remedies. 28 U.S.C. § 2254 (b); Picard v. Connor, 404 U.S. 270, 275 (1971). "For reasons of federalism, 28 U.S.C. § 2254 requires federal courts to give the states an initial opportunity to correct alleged violations of its prisoners' federal rights." Duncan v. Henry, 513 U.S. 364, __, 130 L.Ed.2d 865, 868 (1995). Moreover, a federal court will not review a state prisoner's petition for writ of habeas corpus unless it appears that the prisoner has exhausted available state remedies on each and every claim presented. 28 U.S.C. § 2254(b),(c); Rose v. Lundy, 455 U.S. 509, 522 (1982).

A petitioner has satisfied the exhaustion requirement if: (1) he has "fairly presented" his federal claim to the highest state court with jurisdiction to consider it, Anderson v. Harless, 459 U.S. 4, 6 (1982); Picard, 404 U.S. at 275; or (2) he demonstrates that no state remedy remains available. Harmon

v. Ryan, 959 F.2d 1457, 1460 (9th Cir. 1992); Kellotat v. Cupp, 719 F.2d 1027, 1029 (9th Cir. 1983); see 28 U.S.C. Section 2254 (c). In order to "fairly present" a federal claim, a prisoner must describe in the state court proceedings both the operative facts and the precise federal legal theory on which his claim is based. Duncan, 130 L.Ed 2d at 838; Anderson, 459 U.S. at 6.

The claims in federal court must be more than just "essentially the same" claims in the state court proceedings. Johnson v. Zenon, 88 F.3d 828, 830 (1996)

As noted above, Petitioner's Return indicates that petitioner wants this Court to stay the instant petition or dismiss the instant petition without prejudice, but petitioner's Traverse indicates that petitioner wants to proceed on all of the exhausted claims at this time. In light of the foregoing inconsistency, petitioner is ordered to confirm his intentions and his understanding of the consequences of his desired course of action by selecting on of the following options:[1]

1. The present Petition may be dismissed and petitioner can present the issues framed in Grounds 2, 3, and 8 through 12, inclusive, of the Petition, to the California Supreme Court by way of habeas corpus. If relief is denied, a new Petition may be filed with this Court containing only issues that have been fully exhausted.

2. Petitioner can request that this Court now rule on all contentions except Grounds 2, 3, and 8 through 12, inclusive, of the Petition. If this Court rules on all of the grounds except Grounds 2, 3 and 8 through 12, inclusive, it will not later rule on these issues, even if petitioner subsequently does exhaust these issues in review by the California Supreme Court. It is a matter of judicial economy to attempt to avoid piecemeal decisions.

3. Petitioner may establish, in his response to this Order,

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1. However, petitioner does not have the option of Staying the proceedings.

that he has in fact exhausted those issues in Grounds 2, 3 and 8 through 12, inclusive, of the Petition.

Petitioner shall file and serve within 18 days of the date of this Order a statement that petitioner either: (1) forever waives his right to assert Grounds 2, 3 and 8 through 12, inclusive, in the present Petition; or (2) establishes that these Grounds have been exhausted by habeas corpus review in the California Supreme Court.

If no written response is received, as set forth above, the Magistrate Judge will assume that petitioner agrees to dismissal of the entire petition without prejudice and wishes to exhaust Grounds 2, 3 and 8 through 12, inclusive, before obtaining a ruling from this Court. If Petitioner elects to waive the contentions set forth in Grounds 2, 3 and 8 through 12, inclusive, or if petitioner can adequately demonstrate exhaustion of these issues, the Court will then order a Return from respondents on the merits, and petitioner will be given an appropriate amount of time to file a Supplemental Traverse.

Finally, a district court has discretion to Stay proceedings on a habeas petition containing only exhausted claims, in order to give a petitioner time to exhaust newly discovered claims in state court before amending the federal habeas petition. Greenawalt v. Stewart, 105 F.3d 1268, 1274 (9th Cir. 1997) (per curiam), citing Fetterly v. Paskett, 997 F.2d 1295, 1301-02 (9th Cir. 1993), cert. denied, 513 U.S. 914 (1994); see also Calderon v. U.S. District Court (Gordon), 107 F.3d 756, 761 n.10 (9th Cir. 1997) (as amended per Order, April 15, 1997, 1997 WL 183877).

Therefore, because the instant Petition contains both exhausted and unexhausted claims, this Court does not have the discretion to Stay such a Petition pending the conclusion of state court proceedings. Petitioner's Motion for Stay is denied.

DATED: 8/4/97

/s/
STEPHEN J. HILLMAN
UNITED STATES MAGISTRATE JUDGE

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Richard Herman Ford/ E-10539
Name
CSP/Sac. A, Box 290066

Represa, CA 95671-0066
ADDRESS or PLACE OF CONFINEMENT
and PRISON NUMBER

Note: It is your responsibility to notify the Clerk of Court in writing of any change.
writing of any change.

Note: *If represented by an attorney, his name, address & Telephone number.*

FILED
CLERK U.S. DISTRICT COURT
APR - 7 1998
CENTRAL DISTRICT OF CALIFORNIA
BY CLERK

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT

PETITION FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

RICHARD HERMAN FORD FULL NAME INCLUDE NAME UNDER WHICH YOU WERE CONVICTED *Petitioner,* vs. S. HUBBARD, Warden NAME OF WARDEN, SUPERINTENDENT JAILOR, or AUTHORIZED PERSON having custody of petitioner *Respondent.* and ATTORNEY GENERAL OF THE STATE OFCa. Daniel Lungren Additional Respondent.	CASE NO.CV98-2556WDK-SH To be supplied by the Clerk of the United States District Court PETITION FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

LODGED
CLERK, U.S. DISTRICT COURT
APR - 6 1998
CENTRAL DISTRICT OF CALIFORNIA

(If petitioner is attacking a judgment which imposed a sentence to be served in the *future*, petitioner must fill in the name of the state where the judgment was entered. If petitioner has a sentence to be served in the *future* under a federal judgment which he wishes to attack, he should file a motion under 28 U.S.C. § 2255, in the federal court which entered the judgment.)

INSTRUCTIONS – READ CAREFULLY

This petition shall be legibly handwritten or typewritten, and signed by the petitioner, under penalty of perjury. You must forth CONCISELY the answer to each question in the proper space on the form. Any false statement of material may serve as the basis for prosecution and conviction for perjury.

You must not attach separate pages to this petition, except that *ONE* separate additional page is permitted in answering Question No. 10.

Upon receipt of a fee of $5.00 you petition will be filed if it is in proper order.

If you are seeking leave to proceed *in forma pauperis* (without paying the $5.00 filing fee and other court costs), then you must also execute the declaration on the last page, setting forth information which establishes your inability to pay the fees and costs of the proceedings or to give security therefor. If you wish to proceed in forma pauperis, you must have an authorized officer at the penal institution complete the certificate as to the amount of money and securities on deposit to your credit in any account in the institution. If your prison account exceeds $*25.00*, you must pay the filing fee as required by the rule of the district court.

When the petition is completed, the original and two copies must be mailed to the Clerk of the United States District Court for the Central District of California, United States Courthouse, 312 North Spring Street, Los Angeles, California 90012. ATTN: Intake/Docket Section.

Only one sentence, conviction or parole matter may be challenged in a single petition. If you challenge more than one, you must do so by separate petitions.
Petitions which do not conform to these instructions will be returned with a notation as to the deficiency.

PLEASE COMPLETE THE FOLLOWING: (Check appropriate number)

This petition concerns:

1. __X__ A conviction.

2. __X__ A Sentence.

3. _____ Jail or prison conditions.

4. _____ Prison discipline.

5. _____ A parole problem.

6. _____ Other.

PETITION

1. Place of detention CALIFORNIA STATE PRISON-SACRAMENTO, Represa, CA

2. Conviction on which the petition is based (a separate petition must be filed for each conviction being attacked).

a. Nature of offense involved (include all counts) Conspiracy to Murder; Murder; Special Circumstance of Murder for Financial Gain.

b. Penal or other code section or sections PC §§182, 187, & 190.2(a)(1)

c. Name and location of sentencing court Los Angeles Superior Court, Northwest District- Van Nuys, 6230 Sylmar Avenue, Van Nuys, CA 91401.

d. Case Number Los Angeles No. A399663; Court of Appeal No. B041110

e. Date of Conviction October 11, 1998

f. Date of Sentence February 23, 1989

g. Length of sentence on each count 25-Life [Stayed (PC § 182)]; Life Without Possibility of Parole [PC §§187, 190.2(a)(1)].

h. Plea (check one)
(1) Not guilty (x) (2) Guilty ( ) (3) Nolo Contendere ( )

i. Kind of trial (check one)
(1) Jury (x) (2) Judge alone ( ) (3) Judge alone on transcript ( )

j. Did you testify at trial? Yes ( ) No (x)

3. Did you appeal from the conviction of sentence?
Yes (x) No ( )

4. If you did appeal, give the following information for each appeal

a. (1) Name of Court California Court of Appeal, 2nd Appellate District, Division 7
(2) Result Conviction Affirmed- Petition for Rehearing Denied
(3) Date of result November 16, 1992
(4) Citation or number of opinion B04110
(5) Grounds raised (list each)
(a) Tape recording used in evidence was in violation of Constitutionally cognizable expectation of privacy.
(b) Seizure of recording exceeded scope of warrent.
(c) Warrent for tape recording obtained in violation of Title III, Omnibus Crime Act, 18 U.S.C. 2510 et. seq.
(d) Tape recording was used in violation of protected marital privilege.
(e) Subsequent judge changed original judge's ruling of PC§995 (People's "judge shopping") constituted abuse of discretion and fourteenth amend. violation.

(f) Inaccurate ruling regarding "overt acts" among conspirators was misstatement of law and amounted to abuse of judicial discretion.
(g) Abuse of discretion for refusal of juror instruction regarding unanimous agreement on specific overt act.
(h) Abuse of discretion by court in refusing impeachment of People's witness regarding felony conviction and hatred of LAPD where petitioner was employed.
(i) Abuse of discretion in allowing prejudicially misleading photograph into evidence.
(j) Instruction on motive was unsupported by the evidence and was prejudicially misleading.
(k) Instruction on admissions was ambiguous as worded and should not have been given.

b. (1) Name of Court California Supreme Court
(2) Result Petition for Review - Denied
(3) Date of result February 11, 1993
(4) Citation or number of opinion S030295
(5) Grounds raise (list each)
(a) Jail tape recording
(b) Investigative authority/tape
(c) Marital relation/4th Amndt.
(d) No "good faith" exception
(e) Marital privilege
(f) "overt acts" allegations/ruling
(g) Change of 995 ruling violation
(h) Jury unanimity instructions

5. If you did not appeal:

a. State your reasons Petitioner did not "exhaust" Grounds b, c, h, i, j & k [see Part-4(a)(5)] and the "newly discovered" issues [stated at Part -7] due to the neglect of state appointed [C.A.P.] appellate counsel

b. Did you seek permission to file a late appeal?
Yes ( ) No (x)

6. Other than a direct appeal, have you previously filed any petitions, applications or motions with respect to the conviction in any court, state or federal? Yes (x) No ( )

7. If your answer to 6 was *YES* give the following information.

a. (1) Name of court U.S. District Court-Central District/ 312 North Spring Street

(2) Nature of proceeding Petition for H.C./ "MOTION TO STAY FED PETITION FOR H.C. CONTAINING EXHAUSTED GROUND WHILE PETITIONER EXHAUSTS UNEXHAUSTED STATE CLAIMS ON STATE APPELLATE No. B041110"

(3) Grounds raised (a) Tape evidence
(b) [tape] exceeded scope of warrant
(c) Warrant violated 18 USC §2510
(d) Tape recording violated privilege
(e) Abuse of discretion
(f) Trail Court error re. "Overt acts"
(g) Abuse of discretion/instruction
(h) Abuse of discretion re. impeachment
(i) Abuse of discretion re. photo
(j) Instruction re. "motive" prejudice
(k) Instruction on "admissions" prejudice

(4) Result "MOTION" denied/Pet. for writ of HC "DISMISSED" W/O prejdc

(5) Date of result 10-14-97

(6) Citation or number of any written opinions or orders entered pursuant to each such disposition. CV-97-3386-RAP (SH)

b. (1) Name of court California state Supreme Court

(2) Nature of proceedings Petition for writ of habeas corpus/filed 10-24-97

(3) Grounds raised
a) Seizure exceeded warrant.
b) Warrant violated Fed Regs.
c) Abuse of discretion/witness
d) Abuse of discretion/Photo.
e) Instruction on motive
f) Instruction on "admissions"
g) Joinder of applicable issues raised by co-DEFENDANT

(4) Result Denied

(5) Date of result March 25, 1998

(6) Citation or number of any written opinions or orders entered pursuant to each such disposition. S065283

c. (1) Name of court California state Supreme Court

(2) Nature of proceedings "Supplemental" Pet. for W of H.C. / filed: 11-19-97

(3) Grounds raised "Newly Discovered Evidence" "Miscarriage of Justice"

a) Investigatory and prosecutorial misconduct/drugged witness

b) Investigatory and prosecutorial misconduct/ "police-agents"

c) Prosecutorial misconduct/Misstate ment of Evidence

d) Judicial nonfeasance/Abuse of

discretion/Directed verdict.

e) Insufficiency of evidence to prove charged allegations.

(4) Result DENIED

(5) Date of result MARCH 25, 1998

(6) Citation or number of any written opinions or orders entered pursuant to each such disposition. S06583

8. Was an evidentiary hearing held? Yes ( ) No (x)
9. If so, state the name of the court, and the result. N/A

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10. Grounds for Relief:

a. Ground One: TESTIMONY USED TO CONVICT PETITIONER WAS OBTAINED FROM "DRUGGED" ALLEGED "CO-CONSPIRATOR" [WHO HAS SINCE RECANTED AND APPEALED THE "COERCED" PLEA-BARGAIN] AND VIOLATED HIS RIGHTS.

Supporting Facts: Indictment and conviction of PETITIONER derived and was obtained by the false and "coerced" testimony of alleged "co-conspirator" and misconduct of district officials who held said co-conspirator incommunicado whereat (according to her later petitions for WoHC and 1983 civil complaint) she was forced to take psychotropic drugs and was threatened with the death penalty if she did not cooperate to implicate the PETITIONER.

b. Ground Two: "EMPLOY" OF "POLICE-AGENTS" TO INCULPATE THE PETITIONER BY FALSE TESTIMONY WAS INVESTIGATORY AND

PROSECUTORIAL MISCONDUCT VIOLATING STARE DECISIS OF MIRANDA & WONG SUN AND PETITIONER'S CONSTITUTIONAL RIGHTS PURSUANT TO 4th, 5th 6th & 14th AMENDMENTS.

Supporting Facts: PETITIONER alleges that the conviction and sentence of which he presently suffers was illegally obtained by employ and use of "police-agents" [Adams & Love] who mitigated their criminal conduct (and received financial or other inducements) by co-operation and testimony to inculpate the PETITIONER resulting in his unlawful indictment and subsequent conviction.

c. Ground Three: MISSTATEMENT OF EVIDENCE AND OTHER CASE FACTORS TO CAUSE INDICTMENT AND SELECTIVE PROSECUTION OF PETITIONER VIOLATED [THE "TRUTH-IN-EVIDENCE" DOCTRINE] HIS CONSTITUTIONAL RIGHTS.

Supporting Facts: Aforesaid misconduct by deputy district attorney and subordinate officials of the Los Angeles Police Department (to falsify search-warrant affidavits; misstatement of evidence; employ and use of said "police-agents" and causing false testimony to a Grand Jury) resulted in indictment, conviction and judgment imprisoning PETITIONER for the duration of his life is violation of his Constitutional rights.

d. Ground Four: JUDICIAL MISFEASANCE, ABUSE OF DISCRETION AND NONFEASANCE WAS MISDIRECTION OF JURY AND CONSTITUTED A DIRECTED VERDICT WHICH VIOLATED

PETITIONER'S RIGHT TO EQUAL PROTECTION, DUE PROCESS AND TRIAL "... by an impartial jury.."

Supporting Facts: Conduct and non-feasance by judicial officials legitimized and sanctioned misconduct and malfeasance of deputy district attorney and police officials resulted in validation of illegal search warrant; employ of "police-agents" ; misstatement of evidence or law; abuse of discretion; improper or lack of (jury) instructions served to prejudice PETITIONER'S right to; the presumption of innocence; Equal Protection, Due Process and fair trial ".. by an impartial jury..", which PETITIONER contends constitutes misdirection of jury; a "directed verdict" and violation of law.

e. Ground Five: WARRANT FOR ["WIRE -TAP" TAPE RECORDING WAS OBTAINED IN VIOLATION OF Title-III Omnibus Crime Act (18 USC § 2510 et seq.) VIOLATING PETITIONER'S CONSTITUTIONAL RIGHTS.

Supporting Facts: Investigative officials did not adhere to federal mandates and circumvented said requirements regarding: time limit; affidavits and "probable cause" for obtaining court order to conduct electronic eavesdropping upon (only) the (as yet not convicted) PETITIONER and his spouse in violation of the 4th, 5th and 14th Amendments of the U.S. Constitution.

f. Ground Six: "SEIZURE" [of "tape-recorded" evidence was illegal and] EXCEEDED THE SCOPE OF THE WARRANT, VIOLATING THE CONSTITUTIONAL RIGHTS OF THE PETITIONER AND HIS SPOUSE BY THEIR

ABRIDGEMENT.

Supporting Facts: Warrant, to obtain order for the "tape-recording" of the jail-house visits of [only] the PETITIONER'S spouse, referred to "future plans" of criminal activity. It made no authorization for seizure of information with respect to (alleged) prior criminal conduct nor exemption as to abridgement or violation of 4th, 5th and 14th Amendments of the U.S. Constitution.

g. Ground Seven: THE "GOOD FAITH" EXCEPTION TO WARRANT REQUIREMENTS DID NOT APPLY, ABRIDGING AND VIOLATING THE CONSTITUTIONAL RIGHTS OF THE PETITIONER AND HIS SPOUSE.

Supporting Facts: Absent a showing of "probable cause" existing law required that a "good fait" exception is not sufficient to abrogate observance of existing statutes pertaining to electronic surveillance of (select) pre-trial jail prisoners and/or private citizens (by the abridgement or violation of Constitutional rights).

h. Ground Eight: THE "CRIME OR FRAUD" EXCEPTION TO WARRANT REQUIREMENTS DID NOT APPLY, ABRIDGING AND VIOLATING THE CONSTITUTIONAL RIGHTS OF THE PETITIONER AND HIS SPOUSE.

Supporting Facts: PETITIONER contends that the rationalizations and subsequent justifications for exemption from warrant requirements was a fait accomplis and extrapolated after-the-fact of violating 'wire-tap' regulations [by falsification of affidavits so as to obtain desired court order] which aforesaid officials attempt to

justify by pre-trial criminalization of PETITIONER and his spouse.

i. Ground Nine: THE 'MARITAL RELATION' [of PETITIONER and his spouse] TRIGGERED A FOURTH AMENDMENT PROTECTION WHICH WAS VIOLATED ALONG WITH EXISTING 'MARITAL PRIVILEGE WHEN OFFICIALS CONTRIVED TO TARGET THE RELATIONSHIP BY WIRE-TAP SURVEILLANCE.

Supporting Facts: Investigative officials contrived the pre-determined search of PETITIONER'S [former] residence, knowing that on a usual visiting day his spouse would subsequently visit, where after said officials could [and did] then tape-record the reaction and statements of the PETITIONER by circumventing Miranda, the 'marital privilege', 4th, 5th and 14th Amendment rights.

j. Ground Ten: FEDERAL LAW (Of 1983) DID RECOGNIZE THAT THE FOURTH AMENDMENT APPLIES IN A JAILHOUSE SETTING WHICH WAS VIOLATED WHEN INVESTIGATIVE OFFICIALS TARGETED ONLY THE PETITIONER AND HIS SPOUSE FOR ELECTRONIC SURVEILLANCE WITHOUT BENIFIT OF COUNSEL OR ANY NOTIFICATION THAT THEIR CONSTITUTIONAL RIGHTS WERE SUSPENDED.

Supporting Facts: Illegally obtained warrant violated the 'material privilege' of PETITIONER and his spouse, and their reasonable expectations against only their relationship being targeted so that any tape-recording derived by said surveillance would be constructed and interpreted to have

criminal intent without benefit of any Constitutional provisions.

k. Ground Eleven: AN INVESTIGATIVE AUTHORITY THAT HAS NO CONCERN FOR, OR AUTHORITY OVER, JAIL SECURITY RECEIVES NO DEFERENCE FOR ITS INTRUSIONS ON INMATE/CITIZEN PRIVACY [AND VIOLATED THE CONSTITUTIONAL RIGHTS OF THE PETITIONER AND HIS SPOUSE].

Supporting Facts: PETITIONER contends that said surveillance was undertaken by officers of a police agency, not charged with jail security, for the sole purpose of circumventing Miranda, 'marital privilege' and abridging the rights of PETITIONER and his spouse.

l. Ground Twelve: CHANGING THE RULING ON 995 MOTION VIOLATED DUE PROCESS [AND WAS AN ABUSIVE OF DISCRETION WHICH PREJUDICED PETITIONER'S RIGHT TO A FAIR TRIAL, EQUAL PROTECTION AND DUE PROCESS].

Supporting Facts: Rather than appealing an adverse ruling, granted to defense on 995 motion, the prosecution moved (CCP 170.6) to preemptory challenge the seated judge. The subsequent judge modified the ruling on 'overt-acts' which served to incriminate the PETITIONER by association. PETITIONER contends that this challenge was 'judge shopping' by the state in order to circumvent the ruling; cause its modification and secure a judge less neutral.

m. Ground Thirteen: RULING THAT DISCUSSIONS AND INTERNAL ARRANGEMENTS AMONG [ALLEGED] C0-CONSPIRATORS ARE "OVERT-ACTS" WAS MISSTATEMENT OF LAW AND ABUSE OF DISCRETION WHICH VIOLATED THE PETITIONER'S CONSTITUTIONAL RIGHT TO A FAIR TRIAL.

Supporting Facts: Trial Court ruling, with respect to "overt-acts" allegations, constituted an abuse of discretion which inculpated the PETITIONER in a criminal relationship charged as conspiracy. Said 'overt-acts' as alleged by prosecutor were no, by definition, any acts of PETITIONER but rather conduct unrelated to illegal activity or of third party conspirators - - the chief of which has since recanted and appealed for relief from her judgment.

n. Ground Fourteen: ABUSE OF DISCRETION BY TRIAL COURT IN REFUSING IMPEACHMENT OF PEOPLE'S WITNESS REGARDING (PRIOR) FELONY CONVICTIONS AND (WITNESS) HATRED OF L.A.P.D. (where PETITIONER was employed] VIOLATED HIS RIGHT TO CONFRONT WITNESSES AND RECEIVED A FAIR TRIAL.

Supporting Facts: People's witness, Darlis Chefalo, allegedly had a child (who was) raped by L.A.P.D. officers and series of arrests for offenses including burglary; heroin; assault W/deadly weapon; and aggravated assault which occurred between 1959 and 1977 (with the events she testified to having occurred in 1982). Court ruling against admissions of aforesaid evidence, for impeachment purposes, violated the PETITIONER'S 6th Amendment

right to confront witnesses (present a defense) and to receive a fair trial.

o. Ground Fifteen: ALLOWING [PREJUDICIAL MISLEADING] PHOTO INTO EVIDENCE PREJUDICED PETITIONER'S RIGHT TO [PRESUMPTION OF INNOCENCE] RECEIVE A FAIR RIAL AND WAS AN ABUSE OF DISCRETION BY TRIAL COURT

Supporting Facts: A news paper photo graph, found in the desk of prosecution witness showed PETITIONER and c-DEFENDANT huddled together in conference. This photo was shown to his jury and it is PETITIONER's contention that it evinced an image of conspiracy which prejudiced his right to [the presumption of innocence and] a fair trial by an impartial jury.

p. Ground Sixteen: [CALJIC-2.71] INSTRUCTION ON "ADMISSIONS" WAS AMBIGUOUS AS WORDED VIOLATING PETITIONER'S RIGHT TO [PRESUMPTION OF INNOCENCE] A FAIR TRIAL.

Supporting Facts: Trial court instructed jury with modified CALJIC-2.71 regarding statements made by DEFENDANT/PETITIONER [on seized tape of jailhouse visit]. The wording of said instructions suggested to the jurors that their only function was to determine whether or not statements constituting 'admissions' were in fact said by DEFENDANT. That it was PETITIONER'S voice [on said tape] was not in controversy — and modified instruction served to obscure the juror's function of determining whether statements were made by the

DEFENDANT actually constituted "admissions" of criminal activity [or waiver of Constitutional rights, with respect to the tape's seizure and testimony of misconduct].

q. Ground Seventeen: [CALJIC-2.51] INSTRUCTION ON "MOTIVE" [IS] UNSUPPORTED BY EVIDENCE AND WAS PREJUDICIALLY MISLEADING VIOLATING PETITIONER'S RIGHT TO [THE PRESUMPTION OF INNOCENCE] A FAIR TRIAL [". . by an impartial jury. ."]

Supporting Facts: Trial Court instructed jury with CALJIC-2.51 regarding "motive". There was no specific evidence presented that DEFENDANT/PETITIONER had a specific motive collateral to that inherent in the allegation of murder for financial gain, which would be universally applicable to anyone so charged. Therefore, [it is the PETITIONER's contention that] the instruction was unjustified and prejudiced [misleading] his jury constituting reversable error.

r. Ground Eighteen: [LACK OF] JURY UNANIMITY INSTRUCTION FOR "OVERT-ACTS", IN A CONSPIRACY [PRECLUDED DELIBERATIONS AS TO 'ACTS' WHICH WERE NOT PROVEN AS TO MOTIVE OR CULPABILITY], VIOLATED PETITIONER'S CONSTITUTIONAL RIGHTS.

Supporting Facts: Trial Court failure to instruct jury with respect to existing requirment [in accord with Ramiriz (1987) 189 Cal.App.3d 603] precluded DEFENDANT/PETITIONER'S jury from deliberations as to alleged 'overt-acts' and evidence of culpability or insufficiency of evidence, with which to conclude guilt as

to allegations of "conspiracy", violated PETITIONERS's 6th and 14th Amendment rights.

s. Ground Nineteen: FELONY CONVICTION JUDGMENT AND SENTENCE WAS MISCARRIAGE OF JUSTICE [OBTAINED BY AFORESAID MISCONDUCT AND JUDICIAL MISFEASANCE] VIOLATING THE STARE DECISIS OF MIRANDA, WONG SUN, BRADY & BERGER AND] PETITIONER'S 4TH., 5TH, 6TH, 8TH & 14TH. AMENDMENT RIGHTS OF THE U.S. CONSTITUTION.

Supporting Facts: Aforesaid acts, omissions and non-feasance by district and judicial official caused or condoned the violations of the PETITIONER's Constitutional rights with respect to observation of existing stare decisis and provisions for effective assistance of counsel; Equal Protection, Due Process and the presumption of innocence [at trial] did prejudice his right to receive a fair trial.

t. Ground Twenty: PETITIONER JOINS IN ALL APPLICABLE ISSUES RAISED AND EXHAUSTED BY THE CO-DEFENDANT AND ALLEGED "CO-CONSPIRATOR" IN THEIR APPEAL FOR RELIEF FROM THE AFORESAID CONVICTION AND JUDGMENTS.

11. If any of the grounds listed in 10 were not previously presented to this court or any other court, state briefly which grounds were not so presented and give your reasons. _____

12. Do you have any petition, appeal or parole matter panding

in any court, either state or federal as to the judgment of conviction under attack? Yes ( ) No (x)

13. Are you presently represented by counsel? Yes ( ) No (x)

WHEREFORE, petitioner prays that the court grant petitioner relief to which he may be entitled by this proceeding.

Dated this 1st. day of April , 1998 /s/
Richard Herman Ford
Pro Se

VERIFICATION

I DECLARE AND VERIFY THAT THE FOREGOING IS TRUE AND CORRECT, UNDER PENALTY OF PERJURY.
Dated this 1st. day of April , 1998 /s/
Richard Herman Ford
In Propria Persona

Richard Herman Ford/ E-10539
Name
CSP/Sac. A, Box 290066

Represa, Ca 95671-0066
ADDRESS or PLACE OF CONFINEMENT
and PRISON NUMBER

Note: It is your responsibility to notify the Clerk of Court in writing of any change.

Note: *If represented by an attorney, his name, address & Telephone number.*

FILED
CLERK U.S. DISTRICT COURT
APR - 7 1998
CENTRAL DISTRICT
OF CALIFORNIA
BY CLERK

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT

PETITION FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

RICHARD HERMAN FORD
FULL NAME INCLUDE NAME UNDER WHICH YOU WERE CONVICTED

Petitioner,

vs.

S. HUBBARD, Warden
NAME OF WARDEN, SUPERINTENDENT JAILOR, or AUTHORIZED PERSON having custody of petitioner

Respondent.

and

ATTORNEY GENERAL OF THE STATE OFCa.
Daniel Lungren
Additional Respondent.

CASE NO.CV98-2557ER-SH

To be supplied by the Clerk of the United States District Court

PETITION FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

LODGED
CLERK, U.S. DISTRICT COURT
APR - 6 1998
CENTRAL DISTRICT OF CALIFORNIA

(If petitioner is attacking a judgment which imposed a sentence to be served in the *future*, petitioner must fill in the name of the state where the judgment was entered. If petitioner has a sentence to be served in the *future* under a federal judgment which he wishes to attack, he should file a motion under 28 U.S.C. § 2255, in the federal court which entered the judgment.)

INSTRUCTIONS – READ CAREFULLY

This petition shall be legibly handwritten or typewritten, and signed by the petitioner, under penalty of perjury. You must forth CONCISELY the answer to each question in the proper space on the form. Any false statement of material may serve as the basis for prosecution and conviction for perjury.

You must not attach separate pages to this petition, except that *ONE* separate additional page is permitted in answering Question No. 10.

Upon receipt of a fee of $5.00 you petition will be filed if it is in proper order.

If you are seeking leave to proceed *in forma pauperis* (without paying the $5.00 filing fee and other court costs), then you must also execute the declaration on the last page, setting forth information which establishes your inability to pay the fees and costs of the proceedings or to give security therefor. If you wish to proceed in forma pauperis, you must have an authorized officer at the penal institution complete the certificate as to the amount of money and securities on deposit to your credit in any account in the institution. If your prison account exceeds $*25.00*, you must pay the filing fee as required by the rule of the district court.

When the petition is completed, the original and two copies must be mailed to the Clerk of the United States District Court for the Central District of California, United States Courthouse, 312 North Spring Street, Los Angeles, California 90012. ATTN: Intake/Docket Section.

Only one sentence, conviction or parole matter may be

challenged in a single petition. If you challenge more than one, you must do so by separate petitions.
Petitions which do not conform to these instructions will be returned with a notation as to the deficiency.

PLEASE COMPLETE THE FOLLOWING: (Check appropriate number)

This petition concerns:

1. __X__ A conviction.

2. __X__ A Sentence.

3. _____ Jail or prison conditions.

4. _____ Prison discipline.

5. _____ A parole problem.

6. _____ Other.

PETITION

1. Place of detention California State Prison-Sacramento, Represa, California 95671-0066

2. Conviction on which the petition is based (a separate petition must be filed for each conviction being attacked).

a. Nature of offense involved (include all counts) Conspiracy to Commit Murder, Attempted Murder w/Firearm, Administering Stupefying Drugs, Robbery, Conspiracy to Commit Robbery w/Arming, Great Taking Enhancement, False Imprisonment, Assault With Firearm.

b. Penal or other code section or sections PC §§ 182/187, 664/187, 12022(a), 222, 211, 182/211, 12022.5 12022.6, 236, 12022(a), 12055.5, 245(a)(2).

c. Name and location of sentencing court Los Angeles Superior Court – Central District, 111 N. Hill St., Los Angeles, CA 90012-3117

d. Case Number Superior Court No. A392422; Court of Appeal No. B033751.

e. Date of Conviction January 6, 1988

f. Date of Sentence March 11, 1988

g. Length of sentence on each count 25-Life + 11 Years

h. Plea (check one)
(1) Not guilty (x) (2) Guilty ( ) (3) Nolo Contendere ( )

i. Kind of trial (check one)
(1) Jury (x) (2) Judge alone ( ) (3) Judge alone on transcript ( )

j. Did you testify at trial? Yes (x) No ( )

3. Did you appeal from the conviction of sentence?
Yes (x) No ( )

4. If you did appeal, give the following information for each appeal

a. (1) Name of Court California Court of Appeal, 2nd Appellate District, Division 7
(2) Result Conviction Affirmed – Petition for Rehearing Denied
(3) Date of result October 9, 1992
(4) Citation or number of opinion 10 Cal. App. 4th 20; B033751
(5) Grounds raised (list each)
(a) Trial court erred in quashing Subpoena Duces Tecum issued by defense concerning freelance writer who 10 hours of taped interviewed with chief prosecution witness about case.
(b) Defense was unconstitutionally burdened re: balancing test of freelance writer interests pursuant to DELANEY.
(c) Trial court erred in not allowing evidence that prosecutor committed misconduct for instruction police to cease interviewing pros. wit. (impeachment).
(d) Trial court erred in not allowing appellant to present extrinsic evidence of third-party culpability.

(e) Trial court's refusal to allow details of significant evidence for the benefit of co-defendant, hampered petitioner's defense.
(f) Failure to allow evidence of specific acts of misconduct in order to impeach prosecution's prime witness's credibility was error.
(g) Appellant joined in all issues raised by co-appellant in his opening brief and incorporated all arguments therein.

b. (1) Name of Court California Supreme Court
(2) Result Petition for Review - Denied
(3) Date of result January 14, 1993
(4) Citation or number of opinion S029796
(5) Grounds raise (list each)
(a) Appellate Ct. refused to review of [tape Trial Ct. discretionary error.
(b) At issue [tape] material was not within criteria of 'shield law'.
(c) "Balancing Test of Delaney unConstitutionally burdened the PETITIONER.
(d) Due Process duty to collect and share exculpatory evidence.
(e) Jury unanimity instructions required re. each of multiple "overt acts'.
(f) Combination of evidentiary errors deprived Appellant right to present a
(g) defense

5. If you did not appeal:

a. State your reasons Petitioner did not 'exhaust' Ground (d) [See: Part-4 a.(5)] and the 'newly

discovered' issues [stated at Part-7(a), (b) & (c)] due to the neglect of state appointed [C.A.P.] appellant counsel.

b. Did you seek permission to file a late appeal? Yes(?) No ( )

6. Other than a direct appeal, have you previously filed any petitions, applications or motions with respect to the conviction in any court, state or federal? Yes (x) No ( )

7. If your answer to 6 was *YES* give the following information.

a. (1) Name of court U.S. DISTRICT Ct — Central District, 312 Spring Street, L.A. 90012
(2) Nature of proceeding PETITION FOR WRIT OF HABEAS CORPUS/MOTION TO STAY FEDERAL HABEAS CORPUS PETITION CONTAINING EXHAUSTED GROUNDS WHILE PETITIONER EXHAUSTS UNEXHAUSTED STATE CLAIMS ON STATE APPELLATE No. B033751
(3) Grounds raised Same as alleged at Part-4. a. (5) et seq.
(4) Result MOTION: DENIED, PETITION DISMISSED W/O PREJUDICE
(5) Date of result 9-11-97
(6) Citation or number of any written opinions or orders entered pursuant to each such disposition. CV-97-3385-R.A.P. (S.H.)

b. (1) Name of court California state Supreme Court
(2) Nature of proceedings NOTICE AND MOTION FOR LEAVE TO PROCEED — RELIEF FROM DEFAULT
(3) Grounds raised UNEXHAUSTED and 'Newly Discovered' issues as alleged at Part-5. a.

(4) Result Notice and MOTION returned "UNFILED""Court no longer has jurisdiction.."
(5) Date of result 8-1-97
(6) Citation or number of any written opinions or orders entered pursuant to each such disposition. S029796 (B033751) People v. Von Villas, et al.

c. (1) Name of court California state Supreme Court
(2) Nature of proceedings PETITION FOR WRIT OF HABEAS CORPUS
(3) Grounds raised a.) T.C. error denying extrinsic evidence of 3rd.–party culpability
b.) Jury Misconduct. c.) Appellate review error re. search warrant.
d.) Failure to secure and preserve favorable and exculpatory evidence.
e.) T.C. error refusing Jury instruction re. loss of evidence
f.) Employ and use of 'police-agents' to [incriminate and] violate petitioner's
g.) T.C. error refusing to instruct Jury had to be unanimous as to each overt act.
h.) Ineffective Assistance of Counsel. i.) I.A.C. Appellate Counsel.
(4) Result DENIED
(5) Date of result MARCH 25, 1998
(6) Citation or number of any written opinions or orders entered pursuant to each such disposition. S064681

8. Was an evidentiary hearing held? Yes ( ) No (x)
If so, state the name of the court, and the result. N/A

9. If you answer to 6 was NO, explain briefly why you did not seek post-conviction relief in the state courts _____

10. Grounds for Relief:

a. Ground One: EMPLOY AND USE OF POLICE-AGENT' TO [INCRIMINATE AND] VIOLATE THE PETITIONER's CONSTITUTIONAL RIGHTS TO BE FREE FROM SAID INCRIMINATION; ILLEGAL SEARCH & SEIZURE; AND FALSE WITNESS [VIOLATED FRUIT -OF-POISONOUS-TREE DOCTRINE].

Supporting Facts: Information provided by said 'police-agent' was false [as to the PETITIONER] and for the purposes of entrapment and to inculpate the PETITIONER in a criminal activity which were the fantasy of said 'agent' who admitted comitting acts of theft; receiving stolen property; interstate transportation of illegal firearms; acts of prostution; and subsequent criminal activities resulting in arrest, detention and release into the custody of Los Angeles police officials.

b. Ground Two: EQUAL PROTECTION AND DUE PROCESS RIGHTS WERE VIOLATED BY FAILURE TO SUPPRESS A [SEARCH] WARRANT SO LACKING IN SPECIFICITY AND PARTICULARITY THAT IT VIOLATED SEARCH & SEIZURE [REQUIREMENTS].

Supporting Facts: A Search warrant based on false testimony and faulty affidavit produced no evidence of unlawful acts or stolen items attributable to PETITIONER. Item attributed to co-DEFENDANT were used to inculpate PETITIONER by association and false testimony of said police-agent, violating his Constitutional right.

c. Ground Three: TRIAL COURT ERROR QUASHING DEFENSE SUBPOENA DUCES TECUM Re. ['FREELANCE' WRITER AND 10 hrs.] TAPED INTERVIEW WITH CHIEF PROSECUTION WITNESS [said 'POLICE-AGENT'] ABOUT THE CASE DENIED PETITIONER EXCULPATORY EVIDENCE.

Supporting Facts: Free-lance writer conducted [taped] interview with 'police-agent' Bruce Adams. Quashing defense Subpoena Duces Tecum of tape-recording denied the PETITIONER [exculpatory] evidence; to confront witnesses; and the right to present a defense.

d. Ground Four: DEFENSE WAS UNCONSTITUTIONALLY BURDENED BY "BALANCING TEST" OF 'FREE-LANCE' WRITER'S INTEREST, PURSUANT TO DELANEY [v. Superior Court (1980) 50 Cal.3d 785]. 'SHIELD LAW' DOES NOT APPLY TO NON-CONFIDENTIAL MATERIALS.

Supporting Facts: Free-lance writer stated that his only interest [in the tapes] were pecuniary. PETITIONER's appellate counsel specifically stated (see A.O.B. at Pg. 40) that access to said tapes were ". . necessary to present it [in] order to preserve the issue[s] for further review." PETITIONER alleges that said 'tapes' contain admissions of criminal conduct by said 'agent' exculpatory to PETITIONER.

e. Ground Five: FAILURE TO ALLOW EVIDENCE OF SPECIFIC ACTS OF [CRIMINAL] MISCONDUCT FOR IMPEACHMENT PURPOSES OF 'POLICE-AGENT'S' CREDIBILITY WAS

ERROR AND VIOLATED THE PETITIONER's RIGHT TO CONFRONT WITNESSES, PRESENT A DEFENSE AND FAIR TRIAL.

Supporting Facts: After PETITIONER and co-DEFENDANT were arrested, 'police-agent' Bruce Adams became a "protected witness". During this period of time he was arrested on two separate occasions and released into the custody of Los Angeles police officials. Abuse of discretion precluded PETITIONER from presenting this evidence for impeachment purposes and defense contention of third-party culpability.

f. Ground Six: TRIAL COURT NOT ALLOWING EVIDENCE THAT PROSECUTOR COMMITTED WILFULL MISCONDUCT BY INSTRUCTING [POLICE] INVESTIGATOR TO CEASE TAPED INTERVIEWS OF PROSECUTION WITNESS [POLICE-AGENT], [DENIED PETITIONER'S CONSTITUTIONAL RIGHT TO CONFRONT WITNESSES, PRESENT A DEFENSE AND RECEIVE A FAIR TRIAL].

Supporting Facts: Deputy district attorney, Robert Jorgensen, told police investigators to stop taping [interrogation sessions of] the [prosecution] witness lest the information of tape come back to "haunt" him. Considering the factors of the case and that the 'witness' was aforesaid 'police-agent' [Bruce Adams], it is the contention of the PETITIONER that the deputy district attorney [acting under color of authority] deliberately suppressed potentially exculpatory evidence from the defense, violating existing stare decisis, Evidence and Procedural Codes.

g. Ground Seven: TRIAL COURT ERRORED BY NOT ALLOWING [DEFENDANT] PETITIONER TO PRESENT EXTRINSIC EVIDENCE OF THIRD-PARTY CULPABILITY, DENYING [HIS] STATE AND FEDERAL CONSTITUTIONAL RIGHT TO EXCULPATORY EVIDENCE, FAIR TRIAL AND PRESENT DEFENSE.

Supporting Facts: Police officials were in possession of evidence [by descriptions of witnesses] that persons responsible for a robery [PETITIONER was accused of] were done by the same suspects who had committed other such robberies. Trial court ruling denied PETITIONER's right to the presumption of innocence/fair trial.

h. Ground Eight: TRIAL COURT ERROR COMBINATION DEPRIVED [DEFENDANT] PETITIONER's CONSTITUTIONAL RIGHT TO [CONFRONT WITNESSES] PRESENT A DEFENSE AND FAIR TRIAL.

Supporting Facts: Trial court refused to allow evidence with respect to PETITIONER relationship to Darlis Chefalo; taped conversation among 'police-agent' (Adams] and [alleged victim] Loguercio, elided [of] all specific references to [Von Villas] co-DEFENDANT; and those as aforesaid [ibid.] above were abuse of discretion whose combination precluded PETITIONER's exercise of Constitutional provisions.

i. Ground Nine: EQUAL PROTECTION AND DUE PROCESS RIGHTS WERE VIOLATED BY STATE'S FAILURE TO SECURE AND PRESERVE POTENTIALLY EXCULPATORY AND FAVORABLE EVIDENCE

Supporting Facts: State officials lost and/or destroyed the alleged 'crime-scene' [and other] evidence while defendant [PETITIONER] were in custody — even after said evidence was being requested by discovery motion — and became elements of contention with respect to evidence and/or instructions to be considered by the PETITIONER'S jury.

j. Ground Ten: TRIAL COURT PREJUDICED [DEFENDANTS] PETITIONER'S RIGHT TO RECEIVE A FAIR TRIAL BY REFUSING DEFENSE REQUEST [FOR JURY] INSTRUCTIONS Re. INFERENCES TO BE DRAWN AGAINST THE [PEOPLE, for] LOSS OF EVIDENCE SEIZED BY [ILLEGAL] WARRANT.

Supporting Facts: Trial court abused its discretion in ruling against defense request for instructions with respect to aforesaid loss or destruction of 'crime-scene' and other [alleged] evidence which was attributed to [defendants] PETITIONER by said 'police-agent' but not proven except that he was arrested [along with said agent] in proximity or by allegation of items seized by [illegal] warrant from co-DEFENDANT's property.

k. Ground Eleven: TRIAL COURT ERROUNEOUSLY REFUSED TO INSTRUCT THAT THE JURY HAD TO BE UNANIMOUS AS TO EACH [ALLEGED] 'OVERT-ACT' OF [ALLEGED] CONSPIRACY DENYING PETITIONER'S RIGHT TO EQUAL PROTECTION, DUE PROCESS AND TO RECEIVE A FAIR TRIAL.

Supporting Facts: Trial court abused its discretion, violating the Constitutional rights of the PETITIONER

[DEFENDANT], when it refused to instruct the jury with respect to unanimity as to each [alleged' ['overt-act' as a requirement in order to sustain a finding of guilt [as to 'conspiracy'] in accord with existing law.

l. Ground Twelve: JURY MISCONDUCT VIOLATED PETITIONER'S CONSTITUTIONAL RIGHT TO RECEIVE A FAIR TRIAL BY ". . an impartial jury. ." IN ACCORD WITH THE 6TH AMENDT.

Supporting Facts: The jury foreman produced a computer generated 'spread-sheets' [which he secreted into the jury room] to be used by the entire jury. This [f]act which was admitted in post-trial letter to the trial judge] was misconduct and resulted in a post-trial letter to the trial judge] was misconduct and resulted in the illegal influence of the other jurors, violating the PETITIONER's Constitutional right to ". . an impartial jury. ."

m. Ground Thirteen: INEFFECTIVE ASSISTANCE OF [TRIAL] COUNSEL DENIED PETITIONER'S CONSTITUTIONAL RIGHTS WITH RESPECT TO EFFECTIVE ASSISTANCE AND 6TH AMENDMENT.

Supporting Facts: State appointed counsel failed to request and secure exculpatory evidence and scientific tests available to their office. Additionally, attorneys neglected the essential claim of petitioner's defense that aforesaid 'police-agent' [Bruce Adams] acted to inculpate petitioner as a means of exacting any and all efforts to retaliate against petitioner and his business associate by aforesaid entrapment and to mitigate his criminal activity by cooperaying with any law enforcment agency that would accord him protection and monetary compensation.

n. Ground Fourteen: <u>INEFFECTIVE ASSISTANCE OF [STATE APPOINTED] APPELLATE COUNSEL</u>

<u>Supporting Facts</u>: State appointed appellate counsel failed to bring above stated arguments to the attention of appellate authorities and 'exhaust' all existing remedies to the California Supreme Court and refused to voluntarily return all trial transcripts precluding petitioner from 'exhausting' said remedies on 'direct appeal'. This failure resulted in the present delay and redundant activity which the petitioner now attempts to correct by this Court's prior direction.

o. PETITIONER JOINS IN ALL [APPLICABLE] ISSUES RAISED BY CO-DEFENDANT.

11. If any of the grounds listed in 10 were not previously presented to this court, state briefly which grounds were not so presented and give your reasons. _____

12. Do you have any petition, appeal or parole matter pending in any court, either state or federal as to the judgment of conviction under attack? Yes ( ) No (x)

13. Are you presently represented by counsel? Yes ( ) No (x)

WHEREFORE, petitioner prays that the court grant petitioner relief to which he may be entitled to by this proceeding.

Dated this 1 st. day of April, 1998 /s/_____
Richard Herman Ford/
Pro Se

I declare that the foregoing is true and correct under penalty of perjury.

Dated this 1 st. day of April, 1998 /s/_____
Richard Herman Ford
In Propria Persona

No. 03-221

FEB 2 3 2004

IN THE SUPREME COURT OF THE UNITED STATES

CHERYL K. PLILER, Warden of California State Prison—Sacramento, *Petitioner,*

v.

RICHARD HERMAN FORD, *Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S BRIEF ON THE MERITS

BILL LOCKYER
Attorney General of the State of California
MANUEL M. MEDEIROS
State Solicitor General
ROBERT R. ANDERSON
Chief Assistant Attorney General
PAMELA C. HAMANAKA
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Counsel for Petitioner

QUESTIONS PRESENTED

1. Whether the dismissal of a "mixed" habeas petition is improper unless the district court informs the petitioner about the possibility of a stay of the proceeding pending exhaustion of state remedies and advises the petitioner with respect to the statute of limitations in the event of any refiling.

2. Whether a second, untimely habeas petition may relate back to a first habeas petition, where the first habeas petition was dismissed and the first proceeding is no longer pending.

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IN THE SUPREME COURT OF THE UNITED STATES

No. 03-221

CHERYL K. PLILER, Warden of California State Prison—Sacramento, *Petitioner,*

v.

RICHARD HERMAN FORD, *Respondent.*

OPINION OR JUDGMENT BELOW

The opinion of the Ninth Circuit Court of Appeals is reported as *Ford v. Hubbard*, 305 F.3d 875 (CA9 2002), *amended by* 330 F.3d 1086 (CA9 2003), and is reproduced in the appendix to the petition for writ of certiorari. Pet. App. A1-A45.

STATEMENT OF JURISDICTION

The judgment of the Ninth Circuit affirming in part, vacating in part, and remanding with instructions, was amended and entered on May 15, 2003. Pet. App. A2. The Ninth Circuit denied Warden Pliler's petition for rehearing and suggestion for rehearing en banc on the same date. Pet. App. A13. The petition for writ of certiorari was filed on August 8, 2003, and was granted on January 9, 2004. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

Section 2244 of Title 28 of the United States Code provides in pertinent part:

> (d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of —
>
> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.
>
> (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

Section 2254 of Title 28 of the United States Code provides in pertinent part:

> (b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that —
>
> (A) the applicant has exhausted the remedies available in the courts of the State * * * *

Rule 15 of the Federal Rules of Civil Procedure provides in pertinent part:

> (c) Relation Back of Amendments. An amendment of a pleading relates back to the date of the original pleading when
>
> (1) relation back is permitted by the law that provides the statute of limitations applicable to the action, or
>
> (2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading * * * *

STATEMENT OF THE CASE

On October 11, 1988, respondent Richard Herman Ford and co-defendant Anthony Von Villas, both former Los Angeles Police Department officers, were convicted of first-degree murder for financial gain and conspiracy to commit murder for killing Thomas Weed. After the jury deadlocked during the penalty phase of trial, the trial court sentenced Ford to life without the possibility of parole. *See* Pet. App. A18 (Weed Case).

On November 16, 1992, the California Court of Appeal affirmed the judgment of conviction as to Ford. *See People v. Von Villas*, 11 Cal. App. 4th 175, 257-61, 15 Cal. Rptr. 2d 112, 162-65 (1992). Ford's petition for review in the California Supreme Court was denied. *See* Pet. App. A19. A petition for writ of certiorari was denied by this Court on October 4, 1993. *See Ford v. California*, 510 U.S. 838 (1993).

In a separate trial, Ford and Von Villas were also convicted of conspiracy to commit another murder; the charge named Joan Loguercio as the target. In addition, Ford and Von Villas were convicted of two counts of attempted murder involving Loguercio, as well as robbery, conspiracy to commit robbery, and assault with a firearm. Ford alone was convicted of attempted administration of an intoxicating agent. On March 11, 1989, Ford received a sentence of thirty-six years to life. *See* Pet. App. A16 (Loguercio Case).

On October 9, 1992, the California Court of Appeal affirmed the judgment of conviction. *See People v. Von Villas*, 10 Cal. App. 4th 210, 274-75, 13 Cal. Rptr. 2d 62, 107 (1992). Ford's petition for review in the California Supreme Court was denied. *See* Pet. App. A16. A petition for writ of certiorari was denied by this Court on June 14, 1993. *See Ford v. California*, 508 U.S. 975 (1993).

On April 19, 1997, five days before the expiration of the one-year limitation period for filing petitions under the Antiterrorism and Effective Death Penalty Act of 1996 (hereafter AEDPA), *see* 28 U.S.C. § 2244, Ford signed and submitted a *pro se* petition for writ of habeas corpus challenging his conviction in the Weed Case; the petition was forwarded to the clerk and filed in the United States District Court for the

Central District of California on May 5, 1997.[1] J.A. 58-72. On April 19, 1997, Ford filed a motion to stay the petition while he exhausted his state-court remedies on three claims that were not alleged in the petition. J.A. 73-74. On August 4, 1997, the magistrate judge issued an order determining that claims two, three, and eight through twelve were unexhausted (and noting that Ford had admitted as much, but wished to proceed on those claims that were "actionable"). J.A.79-83; *see also* J.A. 75-78. The magistrate judge denied Ford's motion to stay the mixed petition, but gave Ford the option of dismissing his unexhausted claims and proceeding on the exhausted claims; the magistrate judge also informed Ford that any failure to respond to the court's inquiry would result in the dismissal of the petition. J.A. 80-83; *see also* Pet. App. D1-D2. When Ford did not respond, the district court dismissed the petition without prejudice in a judgment entered on October 14, 1997. Pet. App. D1-D5. No appeal was filed. *See* J.A. 9.

On April 19, 1997, Ford signed and submitted a *pro se* petition challenging his conviction in the Loguercio Case; that petition was likewise filed in the United States District Court

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1. In his first petition in the Weed Case, Ford alleged the following claims: (1) the admission of a tape recording violated his constitutionally-cognizable expectation of privacy; (2) the seizure of evidence exceeded the scope of a warrant, in violation of the Fourth Amendment; (3) a warrant for the tape recording was obtained in violation of the federal Omnibus Crime Act; (4) a tape recording was used in violation of his protected marital privilege and invaded his constitutional right to confidential communication; (5) the change of ruling on a motion to dismiss the information violated the Fourteenth Amendment; (6) an inaccurate ruling regarding overt acts among conspirators resulted in a violation of due process; (7) the trial court erred in refusing to give an instruction regarding the need for unanimous agreement on each specific overt act; (8) the trial court's refusal to allow impeachment of the prosecution's witnesses with prior convictions and biases resulted in the violation of the Confrontation Clause; (9) the admission of prejudicially misleading photographs resulted in a violation of the right to a fair trial; (10) the trial court provided a misleading jury instruction regarding motive; and (11) the trial court provided an ambiguous instruction regarding admissions. J.A. 66-71.

for the Central District of California on May 5, 1997.[2] J.A. 35-47. As in the Weed Case, Ford contemporaneously filed a motion to stay the petition while he exhausted his state-court remedies on three claims that were not alleged in the petition. J.A. 48-49. On July 7, 1997, the magistrate judge issued an order finding that grounds four and seven of the petition were unexhausted, and gave Ford the option of dismissing the unexhausted claims and proceeding with only the exhausted claims, or suffering dismissal of the petition. Ford was to notify the court of his choice by July 25, 1997. Ford was also advised in that order that the court did not have the discretion to stay a mixed petition. J.A. 50-53. On July 28, 1997, Ford filed a document notifying the court that he wished to dismiss the petition without prejudice so that he could return to state court to exhaust his unexhausted claims. J.A. 54-55; *see also* Pet.

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2. In his first petition in the Loguercio Case, Ford alleged the following claims: (1) the trial court violated his Confrontation Clause rights when it quashed a subpoena duces tecum concerning a freelance writer who had taped an interview with the chief prosecution witness; (2) the defense was unconstitutionally burdened when the trial court excluded evidence of the writer's pecuniary interest; (3) the trial court erred in not allowing evidence of prosecutorial misconduct on the basis of instructions to the police to cease interviewing witnesses; (4) the trial court erred in not allowing the defense to present extrinsic evidence of third-party culpability; (5) the trial court's refusal to allow evidence about the rape of Ford's wife, tape recordings of the prosecution's key witness, and references to co-defendant Von Villas hampered the defense; (6) the trial court's failure to allow evidence of specific acts of misconduct to impeach the prosecution's key witness was error; (7) jury misconduct occurred when the jury foreman producing his own "spread sheet," which was then used by the entire jury; (8) the trial court's failure to suppress a general warrant lacking in specificity and particularity violated the Fourth and Fourteenth Amendments; (9) the prosecution's failure to preserve potentially favorable evidence resulted in the violation of due process; (10) the trial court prejudicially refused to instruct the jury about the inferences to be drawn against the prosecution for loss of evidence seized pursuant to a warrant; and (11) the trial court erroneously refused to instruct the jury that unanimity was required as to each overt act of each conspiracy alleged. J.A. 43-46.

App. E2. In a separate document, Ford also admitted his "possible failure to exhaust several issues." J.A. 56-57. The petition was accordingly dismissed without prejudice in a judgment entered on September 12, 1997. Pet. App. E7. Again, no appeal was filed. (The petitions filed in 1997 are collectively referred to hereafter as the First Petitions). *See* J.A. 4.

After the First Petitions were dismissed, Ford unsuccessfully sought relief in state court on his unexhausted claims in both cases. *See* Pet. App. A17-A18, A20.

On April 7, 1998, Ford returned to federal court and filed a second petition challenging his conviction in the Weed Case.[3] J.A. 84-103. In a judgment entered on June 30, 1998, the district court dismissed the petition with prejudice as untimely under AEDPA. Pet. App. C1-C9. A second petition challenging Ford's conviction in the Loguercio Case was filed the same day as the Weed petition, and likewise dismissed with prejudice as untimely in a judgment entered on July 27, 1998. (The petitions filed in 1998 are collectively referred to hereafter as the Second Petitions).[4] J.A. 104-20; *see also* Pet. App. B1-B8.

Ford appealed the dismissals of the Second Petitions. The Ninth Circuit consolidated the appeals and granted Ford's request for a certificate of appealability "on the question

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3. In his second petition in the Weed Case, Ford realleged all of the grounds from his first petition, and also alleged the following new grounds: (1) the prosecution erroneously used testimony obtained from a drugged co-conspirator; (2) the use of police agents to inculpate him violated the Fourth, Fifth, Sixth, and Fourteenth Amendments; (3) the prosecution misstated evidence, which violated the truth-in-evidence doctrine and his constitutional rights; (4) judicial misfeasance, abuse of discretion, and nonfeasance misdirected the jury and violated his rights to an impartial jury, due process, and equal protection; and (5) ineffective assistance of counsel. J.A. 93-102.

4. In his second petition in the Loguercio Case, Ford realleged all of the grounds from his first petition and also alleged that he was entitled to relief because his trial and appellate counsel were constitutionally ineffective. J.A. 113-19.

whether his federal habeas petitions were timely under AEDPA's one-year statute of limitations * * * *" Pet. App. A21.

In a published decision authored by Judge Reinhardt and joined by Judge Pregerson (with Judge Silverman dissenting), the majority held that, because "[t]he district court did not * * * inform Ford that it would not have the power to consider his motions to stay the [first] petitions unless he opted to amend them and dismiss the then-unexhausted claims," Ford's decision "to have his timely-filed federal habeas petitions dismissed without prejudice was an uninformed one * * * *" Pet. App. A13-A15. The majority also held that the district court erred by failing to advise Ford "that his federal claims would be time-barred, absent cause for equitable tolling, upon his return to federal court if he opted to dismiss the petitions 'without prejudice' and return to state court to exhaust all of his claims." Pet. App. A14. Finally, the majority held that, because the dismissals of the First Petitions were therefore "improper," the claims that were included in the First Petitions and then reasserted in the Second Petitions were not time-barred under AEDPA, but "relate[d] back to and preserve[d] the filing date of the initial petitions." Pet. App. A15.

The majority vacated the district court's dismissal of the Second Petitions insofar as they contained claims originally raised in the First Petitions, and remanded those claims for reconsideration on the merits. Five claims newly raised in the second petition filed in the Weed Case were remanded for development of a factual record as to whether the statute of limitations should be equitably tolled. Finally, the majority affirmed the dismissal of two ineffective assistance of counsel claims raised for the first time in the second petition filed in the Loguercio Case. Pet. App. A40.

The Warden's petition for rehearing with suggestion for rehearing en banc in the Ninth Circuit was denied on May 15, 2003. Pet. App. A13.

SUMMARY OF ARGUMENT

I. This Court has long held that district courts must dismiss habeas petitions containing both exhausted and unexhausted claims. *Rose v. Lundy*, 455 U.S. 509, 522 (1981); *see also Duncan v. Walker*, 533 U.S. 167, 178-79 (2001). The Ninth Circuit in this case ignored the dictates of *Rose v. Lundy* by holding for the first time anywhere that the dismissal of a mixed petition is "improper" and constitutes "prejudicial" error, unless the district court informs a petitioner that it does "not have the power to consider [any] motion[] to stay the petition[] unless he opt[s] to amend [it] and dismiss the then-unexhausted claims." Pet. App. A14. "Boldly going where no court has gone before," Pet. App. A42 (Silverman, J., dissenting), the panel also required district courts to provide warnings about AEDPA's limitation period before dismissing a mixed petition. District courts must now advise a petitioner "that his federal claims would be time-barred, absent cause for equitable tolling, upon his return to federal court if he opt[s] to dismiss the petition[] 'without prejudice' and return to state court to exhaust all of his claims." Pet. App. A14.

The requirements imposed by the Ninth Circuit promote the goal of "stay and abeyance," a procedure that is inimical to both *Rose v. Lundy* and AEDPA. Under stay and abeyance, a mixed petition may be filed, unexhausted claims dismissed, and a stay of proceedings obtained for the purpose of exhausting the dismissed claims in state court. Once the dismissed claims are exhausted, they may be added to the stayed petition by way of amendment, and are deemed to "relate back" to the original petition, even though they otherwise would be time-barred. This is contrary to AEDPA, which "toll[s] the limitation period for the pursuit of state remedies [but] not during the pendency of applications for federal review * * * *" *Duncan v. Walker*, 533 U.S. at 180.

The Ninth Circuit's holding also undermines AEDPA's interest in finality "by creating more potential for delay in the adjudication of federal law claims." *Duncan v. Walker*, 533 U.S. at 180; *see also In re Blodgett*, 502 U.S. 236, 239 (1992). Stay and abeyance encourages the filing of mixed petitions and the subsequent addition of newly-exhausted but time-barred claims; it thus "increases the risk of the very piecemeal litigation that the exhaustion requirement is designed to reduce." *Duncan v. Walker*, 533 U.S. at 180; *Slayton v. Smith*, 404 U.S. 53 (1971) (*per curiam*) (disapproving the use of stay and abeyance in federal habeas proceedings).

Stay and abeyance, with its attendant delay of federal proceedings, contravenes this Court's admonition that federal courts have a "virtually unflagging obligation * * * to exercise the jurisdiction given them." *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817-18 (1976). In addition, it "fails to account sufficiently for AEDPA's clear purpose to encourage litigants to pursue claims in state court prior to seeking federal collateral review." *Duncan v. Walker*, 533 U.S. at 181 (citing 28 U.S.C. §§ 2254(b), 2254(e)(2), & 2264(a)). And, any advisements regarding AEDPA's limitation period would unduly burden district courts. If allowed to stand, the Ninth Circuit's decision would render AEDPA's limitation period virtually irrelevant, and reduce district courts to "a jurisdictional parking lot." *Sterling v. Scott*, 57 F.3d 451, 454 (CA5 1995).

II. In holding that the claims that were included in the First Petitions and reasserted in the Second Petitions were not time-barred under AEDPA, but "relate[d] back to and preserve[d] the filing date of the initial petitions" pursuant to Rule 15(c) of the Federal Rules of Civil Procedure, Pet. App. A15, the Ninth Circuit erroneously concluded that the relation-back doctrine applies to habeas proceedings.

Under Rule 11 of the Rules Governing Section 2254 Cases, "[t]he Federal Rules of Civil Procedure, to the extent that they are not inconsistent with these rules, may be applied, when

appropriate, to petitions filed under these rules." At the time of its enactment, Rule 15(c) did not apply to habeas proceedings. As the Advisory Committee Notes to Rule 15(c) state, "[r]elation back is intimately connected with the policy of the statute of limitations." *See Harris v. Nelson*, 394 U.S. 286, 295 (1969) (the drafters' intent with respect to the 1938 creation of the Federal Rules of Civil Procedure "indicates nothing more than a general and nonspecific understanding that the rules would have very limited application to habeas corpus proceedings"). Until the enactment of AEDPA, however, there was no statutory limitation period governing habeas corpus proceedings. Thus, to apply Rule 15(c) to habeas corpus cases would be "inconsistent" with "the practice in such proceedings." Fed. R. Civ. P. 81(a)(2); *see also Harris v. Nelson*, 394 U.S. at 294 ("Habeas corpus practice in the federal courts has conformed with civil practice only in a general sense").

Even assuming the relation-back doctrine applies to habeas proceedings, the majority's interpretation of the doctrine would in effect nullify the AEDPA limitation period. Rule 15(c) provides that an amendment of a pleading relates back to the date of the original pleading when "relation back is permitted by the law that provides the statute of limitations applicable to the action, or [¶] * * * the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading * * * *" Building upon the errors discussed previously, the majority held that, because the dismissals of the First Petitions were "improper," the claims that were included in the First Petitions and then reasserted in the Second Petitions were not time-barred under AEDPA, but "relate[d] back to and preserve[d] the filing date of the initial petitions." Pet. App. A15.

No court (other than *Ford*) has ever concluded that an otherwise untimely habeas petition relates back to a prior habeas petition in a proceeding that was dismissed and is no longer pending. As the Fifth Circuit has cogently observed, such an

approach is "impractical," because it "would eviscerate the AEDPA limitations period and thwart one of AEDPA's principal purposes * * * *" *Graham v. Johnson*, 168 F.3d 762, 780 (CA5 1999). The Ninth Circuit's interpretation of the relation-back doctrine is inconsistent with habeas corpus practice and amounts to a subversion of AEDPA's limitation period.

ARGUMENT

I.

THE NINTH CIRCUIT ERRED IN HOLDING THAT THE DISMISSAL OF A MIXED PETITION IS IMPROPER ABSENT ADVICE AND INFORMATION DESIGNED TO EFFECTUATE STAY AND ABEYANCE

This Court has steadfastly held for over twenty years that "a total exhaustion rule promotes comity and does not unreasonably impair the prisoner's right to relief." *Rose v. Lundy*, 455 U.S. at 522. Accordingly, "a district court *must* dismiss habeas petitions containing both unexhausted and exhausted claims." *Id.* (emphasis added); *see also id.* at 518-19 ("A rigorously enforced total exhaustion rule will encourage state prisoners to seek full relief first from the state courts, thus giving those courts the first opportunity to review all claims of constitutional error"); *Coleman v. Thompson*, 501 U.S. 722, 731 (1991) ("This Court has long held that a state prisoner's federal habeas petition should be dismissed if the prisoner has not exhausted available state remedies as to any of his federal claims"); *Castille v. Peoples*, 489 U.S. 346, 349 (1989) ("Respondent's habeas petition should have been dismissed if state remedies had not been exhausted as to any of the federal claims"); *Teague v. Lane*, 489 U.S. 288, 325 (1989) (Stevens, J., concurring) ("In *Rose v. Lundy*, * * * the Court announced that a habeas petition containing exhausted and unexhausted

claims must be dismissed"); *Engle v. Isaac*, 456 U.S. 107, 124 n.25 (1982) ("If [an unexhausted] claim were present, *Rose v. Lundy*, * * * would mandate dismissal of the entire petition").

In *Duncan v. Walker*, 533 U.S. at 167, this Court reaffirmed those well-settled principles in a post-AEDPA habeas proceeding. As stated by the Court, "[t]he exhaustion requirement [set forth in AEDPA] ensures that the state courts have the opportunity fully to consider federal-law challenges to a state custodial judgment before the lower federal courts may entertain a collateral attack upon that judgment." *Id.* at 178-79. *Duncan* also noted that "[t]olling the limitation period for a federal habeas petition that is dismissed without prejudice would * * * create more opportunities for delay and piecemeal litigation without advancing the goals of comity and federalism that the exhaustion requirement serves. We do not believe that Congress designed the statute in this manner." *Id.* at 180.

The Ninth Circuit in this case ignored the foregoing authorities, and held for the first time anywhere that the dismissal of a mixed petition is "improper" and constitutes "prejudicial" error, unless the district court informs a petitioner that it does "not have the power to consider [any] motion[] to stay the petition[] unless he opt[s] to amend [it] and dismiss the then-unexhausted claims." Pet. App. A14. In another first, the panel also required district courts to provide warnings about AEDPA's limitation period before dismissing a mixed petition; district courts must now advise a petitioner "that his federal claims would be time-barred, absent cause for equitable tolling, upon his return to federal court if he opt[s] to dismiss the petition[] 'without prejudice' and return to state court to exhaust all of his claims." Pet. App. A14.

The advisements required by the Ninth Circuit are designed to encourage the stay and abeyance of mixed petitions, a procedure that contravenes *Duncan v. Walker* by permitting AEDPA's limitation period to be tolled during the pendency of a *federal* habeas proceeding. Under stay and abeyance, a mixed federal habeas petition may be filed, unexhausted claims

dismissed, and a stay of the proceeding obtained for the purpose of exhausting the dismissed claims in state court. Once the dismissed claims are exhausted, they may be added to the stayed petition by way of amendment, and are deemed to relate back to the original petition, even where exhaustion was commenced *after* the expiration of AEDPA's limitation period. As such, stay and abeyance runs afoul of this Court's pronouncements that AEDPA's limitation period is tolled only during "the pursuit of state remedies *and not during the pendency of applications for federal review* * * * *" *Duncan v. Walker*, 533 U.S. at 180 (emphasis added).

This case falls squarely within the confines of *Rose v. Lundy* and *Duncan v. Walker*. Ford filed mixed First Petitions and refused the district court's invitation to dismiss his unexhausted claims. Faced with that situation, "the district court * * * did exactly what it was supposed to do: It dismissed Ford's mixed [first] petition[s] without prejudice." Pet. App. A40 (Silverman, J., dissenting).

The majority's holding conflicts with *Rose v. Lundy* and *Duncan v. Walker*, promotes the improper goal of stay and abeyance, serves no purpose other than to subvert the design and intent of AEDPA, and unduly burdens district courts.

A. The Ninth Circuit's Procedure Conflicts With The Total Exhaustion Rule Of *Rose v. Lundy*, Which AEDPA Retained

1. The requirement that a habeas petitioner exhaust his remedies prior to seeking relief in federal court is a long-standing statutory mandate, founded upon principles of federalism and comity, and designed to ensure the prompt resolution of properly-brought claims. In *Rose v. Lundy*, 455 U.S. at 509, this Court noted that the prior version of 28 U.S.C. § 2254 "expressly require[d] the prisoner to exhaust 'the remedies available in the courts of the State,'" *id.* at 519, and that, consequently, "a district court must dismiss habeas

petitions containing both unexhausted and exhausted claims." *Id.* at 522. In addressing the lower court's failure to enforce that requirement, this Court stated:

> * * * [O]ur holdings today reflect our interpretation of a federal statute on the basis of its language and legislative history, and consistent with its underlying policies. There is no basis to believe that today's holdings will "complicate and delay" the resolution of habeas petitions * * *, or will serve to "trap the unwary *pro se* prisoner." * * * On the contrary, our interpretation of §§ 2254(b), (c) provides a simple and clear instruction to potential litigants: before you bring any claims to federal court, be sure that you first have taken each one to state court. * * *
>
> Rather than increasing the burden on federal courts, strict enforcement of the exhaustion requirement will encourage habeas petitioners to exhaust all of their claims in state court and to present the federal court with a single habeas petition. To the extent that the exhaustion requirement reduces piece-meal litigation, both the courts and the prisoners should benefit, for as a result the district court will be more likely to review all of the prisoner's claims in a single proceeding, thus providing for a more focused and thorough review.

Id. at 519-20.

A plurality nevertheless recognized that a total exhaustion rule was not without consequences: "a prisoner who decides to proceed only with his exhausted claims and deliberately sets aside his unexhausted claims risks dismissal of subsequent federal petitions." *Rose v. Lundy*, 455 U.S. at 520-21 (plurality op.).

AEDPA retains the exhaustion requirement of its predecessor statute. Under 28 U.S.C. § 2254(b)(1)(A), habeas relief is likewise prohibited unless "the applicant has exhausted the remedies available in the courts of the State * * * *" AEDPA departs from prior habeas jurisprudence, however, by imposing a one-year limitation period under § 2244(d)(1) to "an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court." Subsection (d)(2) provides tolling of the limitation period for "[t]he time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending * * * *"

In *Duncan v. Walker*, this Court described the interplay of those provisions as follows:

> * * * The exhaustion rule promotes comity in that "'it would be unseemly in our dual system of government for a federal district court to upset a state court conviction without an opportunity to the state courts to correct a constitutional violation.'" * * *
>
> The 1-year limitation period of § 2244(d)(1) quite plainly serves the well-recognized interest in the finality of state court judgments. * * * This provision reduces the potential for delay on the road to finality by restricting the time that a prospective federal habeas petitioner has in which to seek federal habeas review.
>
> The tolling provision of § 2244(d)(2) balances the interests served by the exhaustion requirement and the limitation period. Section 2244(d)(2) promotes the exhaustion of state remedies by protecting a state prisoner's ability later to apply for federal habeas relief while state remedies are being pursued. At the same time, the provision limits the harm to the interest in finality by according tolling effect only to "properly filed application[s] for State post-conviction or other collateral review."
>
> By tolling the limitation period for the pursuit of state remedies and not during the pendency of applications for federal review, § 2244(d)(2) provides a powerful incentive for litigants to exhaust all available state remedies before proceeding in the lower federal courts. * * *

Duncan v. Walker, 533 U.S. at 179-80.

Dismissal of mixed petitions *remains* the only proper course of action under *Rose v. Lundy*, notwithstanding AEDPA's newly-imposed limitation period. Indeed, because *Rose v. Lundy* was decided in 1981, and because AEDPA — which was enacted in 1996 — retains the statutory exhaustion requirement interpreted by that decision, Congress presumably intended *Rose v. Lundy* to apply to post-AEDPA cases. *See Williams v. Taylor*, 529 U.S. 420, 434 (2000) ("When the words of the Court are used in a later statute governing the same subject matter, it is respectful of Congress and of the Court's own processes to give the words the same meaning in the absence of specific direction to the contrary"); *see also United States v. Sisson*, 399 U.S. 267, 297-98 (1970) ("[T]he axiom that courts should endeavor to give statutory language that meaning that nurtures the policies underlying legislation is one that guides us when circumstances not plainly covered by the terms of a statute are subsumed by the underlying policies to which Congress was committed"). Stated somewhat differently, the "design" of AEDPA, *Duncan v. Walker*, 533 U.S. at 180, is consistent with *Rose v. Lundy*'s total exhaustion rule. *See* 141 Cong. Rec. S7847 (daily ed. June 7, 1995) (statement of Sen. Specter) ("[T]his bill does not abolish [the] exhaustion requirement. Unli[k]e the resolution of this issue in the 1990 legislation, which passed the Senate, which eliminated the requirement of exhaustion of State remedies, that provision is not in this bill").

Exhaustion is not a particularly difficult concept for a petitioner to grasp. As this Court noted over twenty years ago:

> * * * §§ 2254(b), (c) provide[] a simple and clear instruction to potential litigants: before you bring any claims to federal court, be sure that you first have taken each one to state court. Just as *pro se* petitioners have managed to use the federal habeas machinery, so too should they be able to master this straightforward exhaustion requirement.

Rose v. Lundy, 455 U.S. at 520.

In sum, AEDPA encourages the filing of exhausted federal habeas petitions by tolling the limitation period for properly-filed state petitions. "Section 2244(d)(1)'s limitation period and § 2244(d)(2)'s tolling provision, together with § 2254(b)'s exhaustion requirement, encourage litigants *first* to exhaust all state remedies and *then* to file their federal habeas petitions as soon as possible." *Duncan v. Walker*, 533 U.S. at 181 (emphasis in original). To countenance anything less than complete exhaustion would be "out of step with this design," "result[ing] in "[a] diminution of statutory incentives to proceed first in state court[, and] * * * the risk of the very piece-meal litigation that the exhaustion requirement is designed to reduce." *Id.* at 180.

The possibility that a refiled petition might be time-barred does not dictate a contrary result.[5/] Congress has afforded petitioners ample time — one year after the finality of their

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5. At least one court of appeals has suggested that a petitioner may avoid that consequence by simultaneously filing a "protective" petition in state court containing claims that may be unexhausted. *See Akins v. Kenney*, 341 F.3d 681, 685-86 (CA8 2003). Under § 2244(d)(2), the state-court filing would toll AEDPA's limitation period, thereby allowing the petitioner to refile in federal court in the event his initial federal petition is dismissed as unexhausted. *See id.* Of course, dismissal may be avoided by filing a fully-exhausted petition in the first place.

state-court convictions — to exhaust their claims and file a federal habeas petition. Moreover, "[s]ection 2244(d)(2) * * * [does] not toll the limitation period during the pendency of * * * [a] federal habeas petition." *Duncan v. Walker*, 533 U.S. at 181-82. Therefore, even if Ford had elected to dismiss the unexhausted claims from the First Petitions, the dismissed claims would have been time-barred upon refiling. *Cf. Rose v. Lundy*, 455 U.S. at 520 (plurality op.) ("By invoking this procedure [dismissal of unexhausted claims], * * * the prisoner would risk forfeiting consideration of his unexhausted claims in federal court. * * * Thus a prisoner who decides to proceed only with his exhausted claims and deliberately sets aside his unexhausted claims risks dismissal of subsequent federal petitions"). And, Ford's "[1998] federal habeas petition[s] contained claims different from those presented in his [1997] petition[s]," *Duncan v. Walker*, 533 U.S. at 181, rendering the consideration of the Second Petitions inappropriate under any circumstances. *See* J.A. 35-47, 58-72, 84-103, 104-20.

2. It may be argued, as suggested by the plurality in *Rose v. Lundy*, that unexhausted claims should be deleted from a mixed petition in lieu of complete dismissal. *See* 455 U.S. at 520-21 (plurality op.). But even if such "purging" were authorized, the Ninth Circuit's prescribed advisements promoting stay and abeyance would remain inconsistent with this Court's policy of "speedy" resolution of federal habeas claims, as reflected in *Rose v. Lundy*. Stay and abeyance allows a habeas proceeding to be placed "on hold" indefinitely pending a petitioner's pursuit of state-court remedies. *See In re Blodgett*, 502 U.S. at 239 ("The orders by the Ninth Circuit to vacate submission of the case until completion of the state collateral proceeding and then to hold the case in abeyance pending filing and resolution of the third federal habeas proceeding in the District Court raise the very concerns regarding delay that were part of the rationale for this Court's decision[] in *Rose v. Lundy*").

Stay and abeyance also frustrates *Rose v. Lundy* in other ways. Although *Rose* contemplated outright dismissal of a mixed petition, or perhaps the litigation of a petition purged of unexhausted claims, stay and abeyance encourages the filing of mixed petitions and eschews dismissal without obtaining the benefit of expeditious federal review of the exhausted claims. Instead, under stay and abeyance, the federal proceeding is "held hostage" in favor of unexhausted claims that, under *Rose v. Lundy*, should play no role in federal review.

B. Stay And Abeyance Subverts The Design And Intent Of AEDPA's Limitation Period

The Ninth Circuit's stay and abeyance procedure is also contrary to the limitation period of AEDPA, which likewise contemplates the expeditious resolution of habeas claims. As set forth previously, 28 U.S.C. § 2244(d)(1) imposes a one-year limitation period for "an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court." Subsection (d)(2) provides tolling for "[t]he time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending * * * *" Section 2244, as explained in *Duncan v. Walker*, does not allow tolling of the limitation period during the pendency of a federal petition. 533 U.S. at 181-82. Stay and abeyance, however, illegitimately affords such tolling by other means.

In a series of cases beginning with *Fetterly v. Paskett*, 997 F.2d 1295 (CA9 1993), the Ninth Circuit institutionalized a practice whereby a mixed habeas petition may be filed, unexhausted claims dismissed, and a stay of the proceeding obtained for the purpose of exhausting the dismissed claims in state court. Once the dismissed claims are exhausted, they may be added to the stayed petition by way of amendment, and are deemed to relate back to the original petition for timeliness purposes. *See, e.g., James v. Pliler*, 269 F.3d 1124, 1126-27

(CA9 2001); *James v. Giles*, 221 F.3d 1074, 1078 (CA9 2000); *Calderon v. District Court (Taylor)*, 134 F.3d 981, 989 (CA9 1998); *see also Kelly v. Small*, 315 F.3d 1063, 1070 (CA9 2003); *Neuschafer v. Whitley*, 860 F.2d 1470, 1472 n.1 (CA9 1988); *but see Taylor*, 134 F.3d at 989 (holding that *Neuschafer* did not apply to cases involving mixed federal habeas petitions).

The Ninth Circuit's practice is designed to bypass the limitation period of AEDPA, which "quite plainly serves the well-recognized interest in the finality of state court judgments." *Duncan v. Walker*, 533 U.S. at 179 (citing *Calderon v. Thompson*, 523 U.S. 538, 555-56 (1998)). As such, stay and abeyance "undermine[s] the interest in finality by creating more potential for delay in the adjudication of federal law claims." *Duncan v. Walker*, 533 U.S. at 180. Indeed, it "increase[s] the risk of the very piecemeal litigation that the exhaustion requirement is designed to reduce." *Id.*; *see also Carey v. Saffold*, 536 U.S. 214, 226 (2002) (discussing AEDPA's "statutory purpose of encouraging prompt filings in federal court in order to protect the federal system from being forced to hear stale claims"). No purpose is served by a stay of federal habeas proceedings except to defy congressional intent and subvert AEDPA's limitation period. An open-ended stay to allow petitioners to exhaust their state remedies would unduly delay the ultimate determination of the issues and reward those, like Ford, who disregard the plain language of AEDPA and file admittedly mixed petitions.

This Court long ago disapproved of the practice of stay and abeyance in habeas proceedings. In *Slayton v. Smith*, 404 U.S. at 53, the district court summarily dismissed a mixed petition. On appeal, the Fourth Circuit agreed that state remedies had not been exhausted, but vacated the district court's judgment and

remanded for further proceedings with instructions to stay the case until the petitioner had sought relief in state court. *Id.* In rejecting that procedure, this Court held:

> The Court of Appeals' form of "abstention" is perhaps technically consistent with the statutory prohibition against issuing the writ where state remedies have not been exhausted. 28 U.S.C. § 2254. But, having determined that state remedies had not been exhausted, the Court of Appeals would have better served the policy of the statute had it avoided any implication as to the merits of so delicate a subject. Further, absent special circumstances, cf. *Nelson v. George*, 399 U.S. 224 (1970), *Wade v. Wilson*, 396 U.S. 282 (1970), rather than ordering retention of the case on the District Court's docket, the Court of Appeals should simply have vacated the judgment of the lower court and directed dismissal of the petition for failure to exhaust state remedies.

Id. at 53-54.

Stay and abeyance has an even greater potential for mischief in capital federal habeas cases, where the incentive to "obtain[] speedy federal relief," *Rose v. Lundy*, 455 U.S. at 520 (plurality op.), is largely absent. *See Woodford v. Garceau*, 538 U.S. 202, 206 (2003) ("Congress enacted AEDPA to reduce delays in the execution of state and federal criminal sentences, particularly in capital cases, * * * and 'to further the principles of comity, finality, and federalism' * * * *") (quoting *Williams v. Taylor*, 529 U.S. at 436); *see also* 141 Cong. Rec. S7804 (daily ed. June 7, 1995) (statement of Sen. Specter) ("[I]n the current context in which habeas corpus appeals now run for as long as a couple of decades, the deterrent effect of capital punishment has been virtually eliminated").

Stay and abeyance contravenes this Court's admonition that federal courts have a "virtually unflagging obligation * * * to exercise the jurisdiction given them." *Colorado River Water Conservation Dist. v. United States*, 424 U.S. at 817-18; *see also Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 716 (1996); *McCarthy v. Madigan*, 503 U.S. 140, 146 (1992); *In re Blodgett*, 502 U.S. at 239-40. If allowed to stand, the majority's holding would render AEDPA's limitation period virtually irrelevant, and reduce district courts to what one appellate court has aptly described as "a jurisdictional parking lot." *Sterling v. Scott*, 57 F.3d at 454.

C. The Ninth Circuit's Advisement Requirement Regarding AEDPA's Limitation Period Is Unduly Burdensome, Will Breed New Disputes, And Threatens To Blur The Distinction Between Impartial Decision-Making And Advocacy

As explained previously, the Ninth Circuit's advisement requirements regarding stay and abeyance and AEDPA's limitation period are inappropriate, because they promote a procedure that runs afoul of *Rose v. Lundy* and AEDPA.

With respect to the limitation-period advisement, moreover, the Ninth Circuit's requirement is unduly burdensome and risks further disputes where subsequent developments reveal the district court's admonitions to have been incorrect. Rule 47(b) of the Federal Rules of Appellate Procedure provides that "[a] court of appeals may regulate practice in a particular case in any manner consistent with federal laws, these rules, and local rules of the circuit. * * *" In *United States v. Hasting*, 461 U.S. 499, 505-06 (1983), this Court stated:

> "[G]uided by considerations of justice," *McNabb* v. *United States*, 318 U.S. 332, 341 (1943), and in the exercise of supervisory powers, federal courts may,

within limits, formulate procedural rules not specifically required by the Constitution or the Congress. The purposes underlying use of the supervisory powers are threefold: to implement a remedy for violation of recognized rights, *McNabb*, *supra*, at 340; *Rea* v. *United States*, 350 U.S. 214, 217 (1956); to preserve judicial integrity by ensuring that a conviction rests on appropriate considerations validly before the jury, *McNabb*, *supra*, at 345; *Elkins* v. *United States*, 364 U.S. 206, 222 (1960); and finally, as a remedy designed to deter illegal conduct, *United States* v. *Payner*, 447 U.S. 727, 735-736, n. 8 (1980).

Id. at 505.

The majority's advisement requirement in this case, however, does not "give appropriate — if, indeed, any — weight to these relevant interests." *United States v. Hasting*, 461 U.S. at 507. As the dissent below observed, the majority "fails to take account of the fact that the district judge will almost never be able to tell, solely from the face of the petition, that the statute of limitations has expired." Pet. App. A42 (Silverman, J., dissenting). Other problems abound:

> * * * Numerous factors can affect a petitioner's decision to delete unexhausted claims and proceed with an amended petition, rather than accept dismissal without prejudice so that unexhausted claims can be pursued in state court. For example, the meritoriousness of the unexhausted claims is an extremely important factor; so is the fact that the failure-to-exhaust might foreclose those claims forever. The availability of key witnesses is another factor. The statute of limitations is only one element in the equation, and a fact-intensive one at that. Leaving aside the question of the proper role of the

> court as a neutral arbiter, the district court simply is in no position to identify all of the considerations that pertain. I respectfully suggest that it is the office of the court to fairly and impartially decide the case before it, not to act as the petitioner's paralegal.

Pet. App. A43 (Silverman, J., dissenting).

Indeed, depending upon matters not before the district court, any advice regarding AEDPA's limitation period might prove to be wrong and mislead the petitioner into a disadvantageous course of action. This Court has never required any warnings or advisements regarding AEDPA's limitation period, nor has it ever held that their absence renders the dismissal of a mixed petition erroneous. *See Duncan v. Walker*, 533 U.S. at 178-79; *Rose v. Lundy*, 455 U.S. at 522. The majority's holding imposes an unwarranted burden upon district courts, creates the potential for misadvisement, and in effect compels district courts to act as advocates.

D. The Ninth Circuit Erroneously Concluded That The District Court's Dismissal Of The Mixed First Petitions Was Improper

Even assuming any stay and abeyance advisements would have been appropriate in this case, the advisements actually given were sufficient. The district court generously allowed Ford to amend the First Petitions to delete the unexhausted claims, rather than dismiss the entire petitions. Ford declined, however, to take up that offer. *See* Pet. App. D1-D2, E2-E3; *see also* J.A. 56-57, 75-78. As pointed out by the dissent below, "[t]he district court correctly offered [Ford] the option of either amending the petition[s] by deleting the unexhausted claims and proceeding with only those that had been exhausted, or suffering the dismissal of his entire petition[s] without prejudice." Pet. App. A40 (Silverman, J., dissenting). The district court dismissed the First Petitions only after Ford failed to state a

choice in the Weed Case, and elected to dismiss his petition in the Loguercio Case. Pet. App. D2, D5, E2, E7.

Although the dismissals occurred after the expiration of AEDPA's limitation period, *see* Pet. App. D5, E7, tolling ("equitable" or otherwise) would not be warranted, because Ford was given the option of dismissing his unexhausted claims as an alternative to complete dismissal. *Compare Duncan v. Walker*, 533 U.S. at 184 (Stevens, J., concurring) ("[E]quitable considerations may make it appropriate for federal courts to * * * toll[] AEDPA's statute of limitations for unexhausted federal habeas petitions"), *with Rose v. Lundy*, 455 U.S. at 520 (plurality op.) (["A petitioner] can always amend the petition to delete the unexhausted claims, rather than returning to state court to exhaust all of his claims"). Nothing more was required. *Cf. Castro v. United States*, 124 S. Ct. 786, 789-93 (2003) (district court *unilaterally* recharacterized petitioner's motion in § 2255 case without providing advisements regarding the potential consequences of such recharacterization).

II.

THE APPLICATION OF FEDERAL RULE OF CIVIL PROCEDURE 15(c) TO HABEAS PROCEEDINGS WOULD IN EFFECT NULLIFY AEDPA'S LIMITATION PERIOD

The Ninth Circuit also held that, because the dismissals of the First Petitions were "improper," the claims that were included in the First Petitions and then realleged in the Second Petitions were not time-barred under AEDPA, but "relate[d] back to and preserve[d] the filing date of the initial petitions." Pet. App. A15. Application of the relation-back doctrine set forth in Rule 15(c) of the Federal Rules of Civil Procedure, however, would be inconsistent with congressional understanding, as well as the clear design of AEDPA. The panel's interpretation of Rule 15(c) ignores legislative intent,

circumvents AEDPA's limitation period, and conflicts with the decisions of every other court to have considered this issue — including three other Ninth Circuit panels.

A. The Relation-Back Doctrine Does Not Apply To Habeas Proceedings

The Federal Rules of Civil Procedure (FRCP) do not uniformly apply to habeas corpus cases. Even though habeas corpus proceedings are characterized as "civil" (as opposed to criminal) in nature, *Browder v. Dir., Dep't of Corrs.*, 434 U.S. 257, 265 n.9, 269 (1978); *Fisher v. Baker*, 203 U.S. 174, 181 (1906), this Court has observed that such a "label is gross and inexact." *Harris v. Nelson*, 394 U.S. at 293-94.

FRCP 81(a)(2) provides that the FRCP applies to habeas corpus cases "to the extent that the practice in such proceedings is not set forth in statutes of the United States and has heretofore conformed to the practice in civil actions." Similarly, Rule 11 of the Rules Governing Section 2254 Cases provides that "[t]he Federal Rules of Civil Procedure, to the extent that they are not inconsistent with these rules, may be applied, when appropriate, to petitions filed under these rules." Rule 11, foll. 28 U.S.C. § 2254. Indeed, the Advisory Committee Notes to Rule 11 state that "Rule 11 permits application of the civil rules only when it would be appropriate to do so," and warn that courts should not "rigidly apply [FRCP] rules which would be inconsistent or inequitable in the overall framework of habeas corpus."

The question of whether application of a particular FRCP rule to a habeas corpus case would be consistent with habeas corpus practice is easily resolved when a particular habeas corpus practice is specifically set forth in a statute or rule. Thus, in *Browder v. Dir., Dep't of Corrs.*, this Court concluded that Rule 12(b)(6) of the FRCP, which allows the filing of a motion to dismiss for failure to state a claim upon which relief may be granted, does not apply in habeas corpus cases because "[t]he procedure for responding to the application for a writ of habeas

corpus * * * is set forth in the habeas corpus statutes, and under Rule 81(a)(2), takes precedence over the Federal Rules."[6] 434 U.S. at 269 n.14.

Likewise, in *Pitchess v. Davis*, 421 U.S. 482 (1975) (*per curiam*), this Court held that FRCP Rule 60(b)(6), which provides for relief from final judgment, does not apply in the habeas corpus context. As this Court observed:

> Respondent failed to exhaust available state remedies on the claim which formed the basis for the unconditional writ, and he is entitled to no relief based upon a claim with respect to which state remedies have not been exhausted. Neither rule 60(b), 28 U.S.C. § 2254, nor the two read together, permit a federal habeas court to maintain a continuing supervision over a retrial conducted pursuant to a conditional writ granted by the habeas court. * * *

Id. at 490.

Harris v. Nelson is perhaps most directly on point. In *Harris*, this Court was faced with the question of whether FRCP Rule 33, which concerns the use of interrogatories for discovery purposes in civil cases, applies to habeas corpus proceedings. Initially, the *Harris* Court noted that habeas corpus proceedings were "unique," and that "[h]abeas corpus practice in the federal courts has conformed with civil practice only in a general sense." 394 U.S. at 294. This Court further observed that the drafters' intent with respect to the 1938 creation of the FRCP "indicates nothing more than a general and nonspecific understanding that the rules would have *very limited* application to habeas corpus proceedings." *Id.* at 295 (emphasis added).

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6. This Court did find, however, based upon "the settled conformity of habeas corpus and other civil proceedings with respect to time limits on postjudgment relief," that Rules 52 and 59 applied to habeas proceedings. *Browder v. Dir., Dep't of Corrs.*, 434 U.S. at 271.

"At the very least, it is clear that there was no intention to extend to habeas corpus, as a matter of right, the broad discovery provisions which, even in ordinary civil litigation, were 'one of the most significant innovations' of the new rules. * * *" *Id.*

This Court concluded that the fundamental differences between ordinary civil actions and habeas corpus proceedings dictated that certain discovery tools provided for in the FRCP should not apply in habeas proceedings:

> * * * [I]t is difficult to believe that the draftsmen of the Rules or Congress would have applied the discovery rules without modification to habeas corpus proceedings because their specific provisions are ill-suited to the special problems and character of such proceedings. For example, Rule 33, * * * provides for written interrogatories to be served by any party upon any "adverse party." As the present case illustrates, this would usually mean that the prisoner's interrogatories must be directed to the warden although the warden would be unable to answer from personal knowledge questions relating to petitioner's arrest and trial. Presumably the warden could solicit answers from the appropriate officials and reply "under oath," as the rule requires; but the warden is clearly not the kind of "adversary party" contemplated by the discovery rules, and the result of their literal application would be to invoke a procedure which is circuitous, burdensome, and time consuming.

Harris v. Nelson, 394 U.S. at 296.

In sum, this Court held that Rule 33 does not apply to habeas corpus proceedings because, "on conventional principles of statutory instruction, [it could not be] properly conclude[d] that the literal language or the intended effect of the Rules indicates that this was within the purpose of the draftsmen or

the congressional understanding." *Harris v. Nelson*, 394 U.S. at 298. Similarly, there is nothing in AEDPA, congressional intent, congressional understanding of federal habeas practice, or even Rule 15(c) itself, to suggest that the relation-back doctrine should apply to habeas proceedings.

1. Application Of Rule 15(c) To Habeas Proceedings Would Be Inconsistent With The Design And Intent Of AEDPA

Rule 15(c) applies only to proceedings that are governed by a statute of limitations. *See* Fed. R. Civ. P. 15(c) (Advisory Committee Notes) ("Relation back is intimately connected with the policy of the statute of limitations"); *Schiavone v. Fortune*, 477 U.S. 21, 29 (1986) (applying relation-back doctrine to New Jersey statute of limitations for libel actions); *see also Percy v. San Francisco Gen. Hosp.*, 841 F.2d 975, 979 (CA9 1988). The rationale for the relation-back doctrine may be found in the purpose served by statutes of limitation governing ordinary civil causes of action, which is to prevent the bringing of "stale" claims. As this Court has stated:

> Statutes of limitation, * * * in their conclusive effects are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them.

Order of R.R. Tels. v. Ry. Express Agency, Inc., 321 U.S. 342, 348-49 (1944); *Wilson v. Garcia*, 471 U.S. 261, 271 (1985) ("Just determinations of fact cannot be made when, because of the passage of time, the memories of witnesses have faded or evidence is lost") *see also Sierra Club v. Chevron U.S.A., Inc.*, 834 F.2d 1517, 1523 (CA9 1987) (quoting *Order of R.R. Tels.*); *cf. Singletary v. Pennsylvania Dep't of Corrs.*, 266 F.3d 186, 193 (CA3 2001) (purpose of relation back is to ameliorate strict application of the statute of limitation); *Hill v. Shelander*, 924 F.2d 1370, 1377 (CA7 1991) (purpose of relation back is to permit amendments to pleadings when the statute of limitation has expired).

In contrast, prior to AEDPA, there was no statute of limitation for habeas filings; until the enactment of § 2244(d)(1), Rule 15(c) did not govern the filing of habeas petitions because there was no need for newly-presented claims to relate back to a previous filing. As such, "it is difficult to believe that the draftsmen of the Rules or Congress would have applied [Rule 15(c)] without modification to habeas corpus proceedings." *See Harris v. Nelson*, 394 U.S. at 296.

Moreover, AEDPA's limitation period serves an entirely different purpose from that of statutes of limitation governing ordinary civil causes of action. The limitation period, and the remainder of the provisions of AEDPA, were designed to prevent federal habeas petitioners from unduly delaying the finality of their state court judgments. As this Court has noted, "'[t]he interest in leaving concluded litigation in a state of repose,'" free from "'further judicial revision,'" has played a defining role in shaping the scope of the writ. *Teague v. Lane*, 489 U.S. at 306 (O'Connor, J.); *accord Butler v. McKeller*, 494 U.S. 407, 412 (1990); *see also Brecht v. Abrahamson*, 507 U.S. 619, 633 (1993) (the distinction between direct and collateral review of state criminal judgments has become so prominent that it now "resounds throughout habeas jurisprudence").

Section 2254(e) provides further indication of Congress' intent to expedite the resolution of habeas corpus cases. Now, if a petitioner has "failed to develop the factual basis of a claim in State court proceedings, the [federal] court shall not hold an evidentiary hearing on the claim" unless certain conditions are

met.[7] And, while de novo review may have once been the standard generally employed for purposes of habeas corpus, *see Norris v. Risley*, 878 F.2d 1178, 1180 (CA9 1989), that is no longer the case under amended § 2254(d). Absent enumerated exceptions, federal courts must defer to state court adjudications of federal constitutional claims when those claims are presentedto the federal courts on habeas corpus.[8] *See Williams v. Taylor*, 529 U.S. 362, 412 (2000).

Accordingly, in providing for a one-year limitation period following the finality of a state-court conviction (plus any tolling as set forth in AEDPA), Congress was not concerned with the possibility that habeas petitioners might present stale claims, that witnesses' memories might fade, or that evidence might be lost or destroyed; Rule 9(a) of the Rules Governing Section 2254 Cases addresses those potential problems. Instead, the one-year limitation period was enacted for the simple purpose of ensuring that federal habeas corpus cases proceed in

---

7. Under AEDPA, a habeas petitioner is entitled to an evidentiary hearing only where:

> (A) the claim relies on (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
> (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2254(e)(2).

8. Deference is required to state court adjudications of federal claims unless that adjudication (1) "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or (2) "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. §§ 2254(d)(1), (2).

a timely fashion. By the time a would-be habeas petitioner reaches the federal court, a full state investigation, trial, appellate — and, in many cases, habeas — review will likely have taken place. Application of the relation-back doctrine would be inconsistent with AEDPA's design to expedite the federal habeas process.

The legislative history of AEDPA reflects that design. On March 24, 1995, Senator Arlen Specter (Pennsylvania) introduced S. 623, a bill seeking federal habeas corpus reform. 141 Cong. Rec. S4590-96 (daily ed. Mar. 24, 1995). Senator Specter explained that reform was sorely needed because "[t]he great writ of habeas corpus" was being "applied in a crazy-quilt manner with virtually endless appeals that deny justice to victims and defendants alike, making a mockery of the judicial system." *Id.* at S4591. Senator Orrin Hatch (Utah), co-sponsor of S. 623, likewise emphasized the need for the bill. He warned that meaningful reform was necessary to "stop repeated assaults upon fair and valid State convictions through spurious petitions filed in Federal court" and described the bill as an means of protecting "constitutional guarantees of freedom from illegal punishment, while at the same time ensuring that lawfully convicted criminals will not be able to twist the criminal justice system to their own advantage." *Id.* at S4596. The Specter/Hatch habeas corpus reform bill was subsequently passed by the Senate as Title VI of S. 735, the Comprehensive Terrorism Prevention Act. 141 Cong. Rec. S7803, S7857, S7868-71 (daily ed. June 7, 1995).

On March 13, 1996, Representative Henry Hyde (Illinois) presented H.R. 2703, the Comprehensive Antiterrorism Act of 1995, to the full House for debate. 142 Cong. Rec. H2137 (daily ed. Mar. 13, 1996). Like S. 735, H.R. 2703 contained provisions for habeas corpus reform, including a limitation period. And like Senators Specter and Hatch, Representative Hyde explained that such reform was necessary to preempt the

"abuse of habeas corpus" by convicted capital murderers whose sole aim is to "stretch it out." 142 Cong. Rec. H2182, H2184, H2249 (daily eds. Mar. 13-14, 1996).

Representative Bill McCollum (Florida), a co-proponent of the bill, expressed a similar sentiment, explaining that, by allowing death row inmates into federal court "one time and one time only," the bill would end "the seemingly endless appeals" and "15- and 20-year delays of carrying out * * * the death penalty." 142 Cong. Rec. H2143 (daily ed. Mar. 13, 1996). And Representative Bob Barr (Georgia), yet another proponent of H.R. 2703, described the bill as the means to "stop the endless, pointless, and abusive delays currently available to those in our State court system to avoid the carrying out of a death sentence," by placing "reasonable time limits on the use of the Federal habeas corpus provision." *Id.* at H2168. As Representative Barr emphasized, "There have to be reasonable limits. There has to be a reasonable balance, else it will be an unreasonable system and wreak havoc on the American people as we have seen decade after decade." *Id.* The House of Representatives subsequently passed S. 735 as amended by H.R. 2703. 142 Cong. Rec. H2267, H2288, H2304 (daily ed. Mar. 14, 1996).

Thereafter, both Houses of Congress adopted the Conference Report on S. 735, renamed the Antiterrorism and Effective Death Penalty Act of 1996. H.R. Conf. Rep. No. 104, 104th Cong., 2d Sess. (1996); 142 Cong. Rec. S3477 (daily ed. Apr. 17, 1996); 142 Cong. Rec. H3618 (daily ed. Apr. 18, 1996). The Conference Report explains that Title I of AEDPA "incorporates reforms to curb the abuse of the statutory writ of habeas corpus, and to address the acute problems of unnecessary delay and abuse in capital cases." H.R. Conf. Rep. No. 104, reprinted in 1996 U.S.C.C.A.N. 944.

On April 24, 1996, President Clinton signed AEDPA into law, acknowledging that "[f]or too long, and in too many cases, endless death row appeals have stood in the way of justice being served," and expressing hope that AEDPA would facilitate his

long-standing efforts to "streamline Federal appeals for convicted criminals sentenced to the death penalty." Pub. L. No. 104-132; 1996 U.S.C.C.A.N. (110 Stat.) 961-1.

But the purpose of habeas corpus reform was not limited to the death penalty arena. *See* 141 Cong. Rec. S7803 (daily ed. June 7, 1995) (statement of Sen. Specter) ("[It is] time to move ahead with legislation to reform habeas corpus in all cases"). The provisions of Chapter 153 of Title 28 of the United States Code apply to *all* habeas corpus cases, and those provisions illustrate with utter clarity Congress' intent to expedite the habeas corpus process in capital and non-capital cases alike. *See Woodford v. Garceau*, 538 U.S. at 206.

2. Application Of Rule 15(c) To Habeas Proceedings Would Improperly Permit The Consideration of Time-Barred Claims

Application of the relation-back doctrine to habeas proceedings would also improperly permit the consideration of newly-exhausted claims that were pursued in state court after the expiration of AEDPA's limitation period. Under § 2244(d)(2), tolling of AEDPA's limitation period occurs while "a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending * * * *" Tolling does not occur, however, during the pendency of federal habeas proceedings. *See Duncan v. Walker*, 533 U.S. at 180. The reason for that distinction is clear: "[by] tolling the limitation period for the pursuit of state remedies and not during the pendency of applications for federal review, § 2244(d)(2) provides a powerful incentive for litigants to exhaust all available state remedies before proceeding in the lower federal courts * * * *" *Id.*

Relation back, on the other hand, provides a powerful incentive for litigants to do the very opposite. Indeed, relation back would validate a process consisting of the filing of a mixed petition, the dismissal of unexhausted claims, and the eventual

consideration of such claims following exhaustion, even where the commencement of exhaustion proceedings occurred *after* the expiration of AEDPA's limitation period; the filing of a *federal* habeas petition would, for all intents and purposes, toll the limitation period. *Compare Duncan v. Walker*, 533 U.S. at 180 ("Tolling the limitation period for a federal habeas petition * * * would * * * create more opportunities for delay and piecemeal litigation without advancing the goals of comity and federalism that the exhaustion requirement serves. We do not believe that Congress designed the statute in this manner").

Thus, as long as a habeas petitioner files a timely petition containing just *one* exhausted claim, any unexhausted claims alleged in the petition would also be considered timely (even if the eventual pursuit of state remedies was *not*) through relation back. Application of the relation-back doctrine under such circumstances would result in the "tail wagging the dog."[9] *Williams v. United States*, 401 U.S. 646, 659 (1971); *see also Rosales-Garcia v. Holland*, 322 U.S. 386, 420 (CA6 2003) (Boggs, J., dissenting) (discussing restrictions on the detention of removable aliens under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996).

B. Even Assuming The Relation-Back Doctrine Applies To Habeas Proceedings, Application Of The Doctrine In The Manner Employed By The Ninth Circuit Was Improper

As set forth previously, the majority in this case held that because the dismissals of the First Petitions were "improper," the claims that were included in the First Petitions and then

9. Moreover, some courts have permitted almost limitless amendment and relation back by defining the terms "conduct, transaction, or occurrence," as set forth in Rule 15(c), at a meaningless level of generality, such as "[the] criminal proceeding." *Compare Ellzey v. United States*, 324 F.3d 521, 525-27 (CA7 2003) *with Davenport v. United States*, 217 F.3d 1341, 1344-46 (CA11 2001) (and cases cited therein).

reasserted in the Second Petitions were not time-barred under AEDPA, but "relate[d] back to and preserve[d] the filing date of the initial petitions." Pet. App. A15.

No other court has ever held that an otherwise untimely habeas petition relates back to a prior habeas petition in a proceeding that was dismissed and is no longer pending. Indeed, at least six other circuit courts of appeals have expressly declined to apply the relation-back doctrine in that manner. *See, e.g., Neverson v. Bissonnette*, 261 F.3d 120, 126 (CA1 2001) (relation-back doctrine did not apply where the dismissal of initial habeas proceeding left "nothing to which Petition No. 2 could relate back"); *see also Newell v. Hanks*, 283 F.3d 827, 834 (CA7 2002); *Marsh v. Soares*, 223 F.3d 1217, 1219-20 (CA10 2000); *Warren v. Garvin*, 219 F.3d 111, 113 (CA2 2000); *Nyland v. Moore*, 216 F.3d 1264, 1266 (CA11 2000); *Jones v. Morton*, 195 F.3d 153, 160-61 (CA3 1999); *cf. Hunt v. Hopkins*, 266 F.3d 934, 936-37 (CA8 2001) (amended petition related back to prior petition in *same* proceeding because *action* had not been dismissed). The majority's holding also conflicts with other Ninth Circuit precedent. *See, e.g., Green v. White*, 223 F.3d 1001, 1003 (CA9 2000) ("A second habeas petition does not relate back to a first habeas petition when the first habeas petition was dismissed for failure to exhaust state remedies"); *Van Tran v. Lindsey*, 212 F.3d 1143, 1148 (CA9 2000) (same); *Henry v. Lungren*, 164 F.3d 1240, 1241 (CA9 1999) (same).

Moreover, Rule 15(c) by its very terms applies only to "[a]n amendment of a pleading"; because the Second Petitions did not constitute "amendment[s]" of the First Petitions, but were instead separate and distinct proceedings, relation back would not be appropriate under *any* circumstances.

The potential impact of the majority's holding is enormous: habeas petitions filed long after the expiration of AEDPA's limitation period would be rendered timely through relation back to a prior petition in a different proceeding, *even*

though that proceeding had been dismissed and was no longer pending. As the Fifth Circuit stated in rejecting such an approach:

> [I]f § 2244(d) were interpreted as Petitioner argues, the result would be impractical. A habeas petitioner could file a non-exhausted application in federal court within the limitations period and suffer a dismissal without prejudice. He could then wait decades to exhaust his state court remedies and could also wait decades after exhausting his state remedies before returning to federal court to "continue" his federal remedy, without running afoul of the statute of limitations.
>
> * * * Construing an application filed after a previous application is dismissed without prejudice as a continuation of the first application for all purposes would eviscerate the AEDPA limitations period and thwart one of AEDPA's principal purposes. * * *

Graham v. Johnson, 168 F.3d at 780 (quoting in part the district court's decision dismissing a second habeas petition as untimely).

The majority's holding constitutes an unwarranted and ill-advised expansion of the relation-back doctrine, and in effect nullifies AEDPA's limitation period.

CONCLUSION

The judgment of the court of appeals should be reversed.

Dated: February 23, 2004

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FOR ARGUMENT

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In The

Supreme Court of the United States

CHERYL K. PLILER, WARDEN OF
CALIFORNIA STATE PRISON-SACRAMENTO,

Petitioner,

v.

RICHARD HERMAN FORD,

Respondent.

**On Writ Of Certiorari To The
United States Court Of Appeals
For The Ninth Circuit**

RESPONDENT'S BRIEF ON THE MERITS

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QUESTION PRESENTED

1 This Court held over twenty years ago that "a district court must dismiss habeas petitions containing both unexhausted and exhausted claims." *Rose v. Lundy*, 455 U.S. 509, 522 (1981). The question presented is:

Whether the dismissal of such a "mixed" habeas petition is improper unless the district court informs the petitioner about the possibility of a stay of the proceeding pending exhaustion of state remedies and advises the petitioner with respect to the statute of limitations in the event of any refiling.

2. Under Federal Rule of Civil Procedure 15(c), "[a]n amendment of a pleading relates back to the date of the original pleading when relation back is permitted by the law that provides the statute of limitations applicable to the action, or [¶] . . . the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading. . . . The question presented is:

Whether a second, untimely habeas petition may relate back to a first habeas petition, where the first habeas petition was dismissed and the first proceeding is no longer pending.[1]

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[1] Ford adopts the "Opinion or Judgment Below", "Statement of Jurisdiction" and "Relevant Statutory Provisions" sections set forth in the Petitioner's Brief on the Merits.

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RESPONDENT'S STATEMENT OF THE CASE

In 1988, respondent Richard Herman Ford, ("Ford") and Robert Anthony Von Villas ("Von Villas"), both former Los Angeles Police Department Officers, were convicted of first-degree murder for financial gain and conspiracy to commit the murder of Thomas Weed. Ford was sentenced to life without the possibility of parole. Pet. App. 18, the "Weed case" J.A. 62.[2]

Ford appealed to the California Court of Appeal, which affirmed the judgment of conviction and sentence. *See People v. Von Villas,* 11 Cal.App.4th 175, 257-61 (1992); Pet. App. 4. The California Supreme Court summarily denied review, *see* Pet. App. A19, and a petition for writ of certiorari was denied by this Court on October 4, 1993. *Ford v. California,* 510 U.S. 838 (1993). Pet. App. 18-19, J.A. 63-64.

In a separate trial, also in 1988, Ford and Von Villas were convicted of conspiracy to commit murder and two counts of attempted murder of Joan Loguercio occurring in June and July, 1983, and with robbery, conspiracy to commit robbery, and assault with a firearm in connection with an unrelated jewelry store robbery occurring on November 22, 1982. Ford received a sentence of 36 years to life on March 11, 1988. Pet. App. 16, J.A. 39.

Ford appealed to the California Court of Appeal, which affirmed his conviction and sentence. *People v. Von*

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[2] The appendix to the petition for certiorari is abbreviated as "Pet. App." and is followed by the applicable page number. All references are to section A unless otherwise noted. The Joint Appendix is abbreviated as "J.A." and is followed by the applicable page number.

Villas, 10 Cal.App.4th 201, 274-275 (1992). The California Supreme Court summarily denied review on January 14, 1993. J.A. 41. A Petition for Writ of Certiorari was denied by this Court on June 14, 1993. *Ford v. California,* 508 U.S. 975 (1993). Pet. App. 16.

On April 24, 1996, the Antiterrorism and Effective Death Penalty Act of 1996, "AEDPA," became effective. 28 U.S.C. § 2244. Under the rule that a one-year "grace period" must be provided for prisoners who wish to challenge convictions that became final before the AEDPA's enactment, Ford was required to file any federal habeas petitions on or before April 24, 1997. *Id.* at 21; 28 U.S.C. § 2244(d).[3] Ford timely filed two pro se federal habeas corpus petitions challenging his convictions in the respective cases, along with motions to stay the proceedings on exhausted claims while he perfected any unexhausted claims in state court. *Id.* at 14; First Petition (Weed), J.A. 79-83, Motion to Stay (Weed), J.A. 73-74, First Petition

[3] The AEDPA establishes a one-year statute of limitation for the filing of federal habeas corpus petitions, which commences on the latest of four triggering dates. 28 U.S.C. § 2244(d)(1)(A)-(D). The most commonly applicable triggering date is the date on which the conviction becomes final. *Id.* at 2244(d)(1)(A). The AEDPA did not, however, provide an exception to this limitation period for prisoners whose convictions became final before its enactment so, to avoid finding that the AEDPA time limit violated the Ex Post Facto Clause, lower courts have uniformly created a one-year "grace period" in which those prisoners may timely file their federal petitions. *See* 28 U.S.C. § 2254(d); *Duncan v. Walker,* 533 U.S. 167, 183, n.1 (2001); *Patterson v. Stewart,* 251 F.3d 1243, 1245 (9th Cir. 2001). For ease of reference, respondent will hereafter refer to the "limitation period" rather than the "grace period."

(Loguercio), J.A. 36-47; Motion to Stay (Loguercio), J.A. 48-49.[4]

In July and August of 1997, after the limitation period had expired, the magistrate judge issued reports giving Ford two options. Under the first option, Ford could withdraw the unexhausted claims from his petitions and proceed with only the exhausted claims. Under the second option, the court would dismiss the petitions "without prejudice," to allow Ford to return to state court, exhaust his unexhausted claims, and return to federal court. Pet. App. 17, 19. The magistrate judge did not, however, inform Ford that the limitation period had run, and therefore a dismissal "without prejudice" would have the effect of being a dismissal "with prejudice." In other words, if Ford chose the option of dismissing the federal petitions and returning to state court to exhaust, he would be time-barred when he attempted to refile his federal petitions unless the court found the statute was equitably tolled. *Id.* at 14.

The reports directed Ford to notify the court only if he wanted to withdraw the unexhausted claims and proceed solely on the exhausted claims. If he failed to do so, the default presumption was that Ford had agreed to dismissal of the entire petition without prejudice in order to exhaust the unexhausted claims. J.A. 52 (Loguercio); J.A. 82 (Weed); Pet. App. D1-2, E2-4.

[4] With respect to the Weed petition, the magistrate judge determined that seven of the eleven claims were unexhausted. J.A. 80. With respect to the Loguercio petition, the magistrate judge determined that two of the eleven claims were unexhausted. J.A. 50-53.

As to Ford's motions to stay, the court concluded it did not have the discretion to stay a mixed petition so the motion to stay the proceedings was denied.[5,6] Ford did not withdraw his unexhausted claims to perfect his stay motions. *Id.* Instead, Ford opted to have the respective petitions dismissed in order to exhaust his unexhausted claims. J.A. 54-55; *see also* Pet. App. E2 (Loguercio).[7]

The magistrate judge issued reports recommending that the district court dismiss Ford's respective habeas

[5] In his Return in the Weed case, Ford indicated he wanted the Court to stay the petition or to dismiss the petition without prejudice. In his Traverse he acknowledged he failed to exhaust several grounds, but indicated he wanted to proceed on all of the exhausted claims. Pet. App. 80, 81. In light of this inconsistency, the magistrate judge "ordered [Ford] to confirm his intentions and his understanding of the consequences of his desired course of action" by selecting one of the following three options: (1) that the petition be dismissed to permit Ford to exhaust the issues framed in grounds 2, 3, and 8-12, and if denied, file a new petition containing the exhausted claims; (2) that he dismiss his unexhausted claims and proceed on the exhausted claims; (3) that he establish the foregoing claims had been exhausted by habeas review in the California Supreme Court. Pet. App. 81-82. Notwithstanding, the magistrate judge waived this requirement when it indicated the court would construe Ford's silence as his consent to dismissal of the entire petition without prejudice. J.A. 82.

[6] However, the magistrate judge did not inform Ford of the highly technical procedural requirement that it could entertain the stay motions if Ford elected to dismiss the unexhausted claims and then renew the stay motions he attempted to make prematurely. Pet. App. 14.

[7] Ford did not provide a written response in the Weed case. Therefore, in accordance with its Order, the magistrate judge construed this as a request to dismiss the petition without prejudice. Pet. App. D1-5. In the Loguercio case, Ford filed a Return notifying the court he wished to dismiss the petition "WITHOUT PREJUDICE," so he could return to state court to exhaust his unexhausted claims. Pet. App. 54-55; Pet. App. E2.

petition without prejudice because they were partially exhausted petitions under *Rose v. Lundy*, 455 U.S. 509 (1981). Pet. App. D1-2 (Weed), E1-E4 (Loguercio). On September 11, 1997 (Loguercio) and October 14, 1997, (Weed), the district court adopted the magistrate's report and dismissed the petitions, "without prejudice." J.A. 17, 20; Pet. App. D1-5 (Weed); Pet. App. E7 (Loguercio).

After the dismissals, Ford proceeded expeditiously. On September 29, 1997, 18 days after dismissal in the Loguercio case, and on October 24, 1997, ten days after dismissal in the Weed case, Ford filed respective habeas corpus petitions in the California Supreme Court challenging his state court convictions. On March 25, 1998, the California Supreme Court summarily denied the petitions. Pet. App. A17-18, A-20. One week later, on April 1, 1998, having exhausted his state remedies, Ford returned to federal court and filed second pro se federal habeas corpus petitions. J.A. 84-103 (Weed); J.A. 104-120 (Loguercio); Pet. App. B1-8 (Loguercio), C1-9 (Weed).

The state moved to dismiss contending Ford's petitions were time-barred, having been filed after AEDPA's April 24, 1997 cut-off date. Ford argued he had diligently litigated his state petitions in reliance on the magistrate judge's 1997 reports that his dismissals without prejudice permitted his return to federal court after exhausting his claims. Pet. App. B4 (Loguercio), C4 (Weed). The district court dismissed the respective petitions as time-barred. Pet. App. 18, 21, C1-9 (Weed); Pet. App. B1-8 (Loguercio). As a result, none of the timely-filed and exhausted constitutional claims set forth in either the initial Loguercio or Weed petitions were ever reviewed.

Ford filed a notice of appeal and applied for a certificate of appealability ("COA"). The district court denied the COA requests, but the Ninth Circuit granted Ford's request for COA's on the question of whether his federal habeas petitions were timely under AEDPA's one-year statute of limitations, 18 U.S.C. § 2244(d). Pet. App. 21.

The Ninth Circuit reversed. It found the dismissals of Ford's initial petitions were improper. In consideration of the fact Ford was proceeding *pro se*, the court held Ford's decision to have his timely-filed petitions dismissed without prejudice was uninformed; the magistrate judge had not informed Ford of either the procedural deficiency that precluded it from considering Ford's stay motions, nor of the time bar he would face if he opted for dismissal of his petitions in their entirety. Pet. App. 15. The court further held that because Ford had been misled and the original dismissals were improper, he could employ the amendment procedures of Federal Rule of Civil Procedure 15 to have the second petition relate back to and preserve the filing date of the initial petitions which were improperly dismissed. *Id.* at 31. As far as the new claims raised in the second petitions were concerned, the court remanded five claims newly asserted in the second Weed petition for consideration of equitable tolling, and affirmed the dismissal of two claims newly raised in the second Loguercio petition. Pet. App. 35-39.

Judge Silverman dissented, writing that requiring the district court to incorporate a warning about the statute of limitations when informing a habeas petitioner of his options with respect to a mixed petition was tantamount to requiring the district judge to improperly act as the petitioner's legal advisor. Pet. App. 6.

The majority and dissenting opinions were amended on May 15, 2003. Pet. App. 7-13. The Ninth Circuit denied the Warden's petition for rehearing and the suggestion for rehearing en banc. Pet. App. 13. The matter failed to receive a majority vote in favor of the suggestion for rehearing en banc. Fed. R. App. P. 35; Pet. App. A13.

SUMMARY OF ARGUMENT

Petitioner has used the narrow holding below to launch a broad-based attack on the right of prisoners who file mixed petitions to return to federal court after exhausting state remedies. This Court consistently has construed governing habeas law to protect that right. It should do the same here. Nothing in AEDPA, or any of this Court's decisions, mandates a different result.

1. Under *Rose v. Lundy*, 455 U.S. 509, a prisoner who files a mixed petition is faced with a choice. If he wishes to proceed in federal court on his exhausted claims, then unexhausted claims will be purged from the petition so that he can do so. But if he is prepared to forgo immediate federal review, then the petition will be dismissed in its entirety "without prejudice," so that he may fully exhaust his state remedies and then return to federal court for one hearing on all of his claims. The decision below turns on a narrow holding that, in the course of offering the choice mandated by *Rose*, a district court must inform a prisoner if one of the options – dismissal for full exhaustion and then return to federal court – is no longer available, as a result of AEDPA's statute of limitations.

Petitioner addresses that limited holding only in passing. Instead, petitioner uses this case as a vehicle for

a far broader argument: that stay procedures routinely employed in the lower courts to effectuate *Rose's* "complete exhaustion" alternative are impermissible. That is not the question on which this Court granted certiorari. Nor is it a question easily reached in this case, which turns critically not on the availability of a stay, but rather on the magistrate judge's failure to inform Mr. Ford that one of his "choices" amounted here to a waiver of federal review of any of his claims.

2. In any event, the widely accepted stay procedures put at issue by petitioner are entirely consistent with *Rose* and with AEDPA. *Rose* precludes *adjudication* of claims that have not first been presented to state court, but it does not even suggest that a *stay* of federal proceedings is somehow inconsistent with comity principles. On the contrary, a stay allows a district court to defer to state courts' initial consideration of a prisoner's claims. And there is no provision in AEDPA that purports to override the inherent authority of district courts to control their dockets through the issuance of stays.

Nor, contrary to petitioner's argument, will stay procedures undermine AEDPA's statute of limitations by encouraging strategic delays and abusive litigation. The stay procedures in question may be invoked only after a prisoner has filed a *timely* petition – which is all that AEDPA's statute of limitations requires. District courts retain ample means of preventing abusive tactics. And the vast majority of habeas petitioners – those, like respondent, not under a sentence of death – have every incentive to speed, not delay, adjudication of their federal claims.

3. On the narrow issue actually presented by this case, the court below was correct in requiring that a

prisoner be informed if one of his *Rose* choices – dismissal for the purpose of complete exhaustion and then a return to federal court – is functionally foreclosed by AEDPA's statute of limitations. Under *Rose,* the magistrate or district court judge is already engaged in instructing the prisoner about his options. All that is required by the decision below is that those instructions not be misleading – that they not hold out the prospect of post-exhaustion federal review if that review is in fact time-barred under AEDPA. This Court's decisions recognize that instructions will sometimes be necessary so that *pro se* prisoners can make informed judgments and do not inadvertently forfeit their rights. *See Castro v. United States,* 124 S. Ct. 786 (2003). This case is no different.

Nor did the Court of Appeals err in providing a remedy under Rule 15(c) for the improper dismissal of Ford's first petitions. Petitioner's argument that Rule 15 does not apply in habeas cases is foreclosed by the statutory text (specifically providing that petitions may be "amended or supplemented as provided in the rules of procedure applicable to civil actions," 28 U.S.C. § 2242) and contrary to uniform case law in the federal courts of appeals. The narrow decision of the court below to use Rule 15(c) to provide relief in this instance, where the original petitions were *improperly* dismissed, is not precluded by AEDPA and is within the court's remedial discretion.

4. If it does not affirm the decision below, then this Court should remand for consideration of equitable tolling. The court of appeals did not rule on whether Ford was entitled to relief under equitable tolling principles, though it suggested – correctly – that he would be. The issue was not presented for review in the petition for certiorari. The

proper resolution of the issue should be committed in the first instance to the court below.

ARGUMENT

I. THE COURT OF APPEALS PROPERLY HELD THAT RIGHTS ADVISEMENTS MUST BE GIVEN TO A PRO SE PRISONER LITIGANT REGARDING THE AVAILABLE OPTIONS BEFORE DISMISSING A MIXED PETITION.

A. Petitioner Has Waived The Claim That The Stay Procedure Is Improper.

Petitioner challenges the validity of the Ninth Circuit's opinion, asserting the majority erred when it held that dismissal of a mixed petition is improper absent advisement and information designed to effectuate stay and abeyance. It contends Ford was *not* entitled to be apprised of the court's ability to consider his stay motions because this would encourage "stay and abeyance", a procedure it says, contravenes Congressional intent and the dictates of *Rose*, 455 U.S. 509, and *Duncan*, 533 U.S. 167. Pet. Br. 12-26. Before reaching the merits of these arguments, it is important to clarify what this case is and is *not* about.

This case did *not* concern, and in the proceedings below the petitioner did *not* challenge the propriety of the Ninth Circuit's stay procedure. The Ninth Circuit made no *holding* regarding the propriety of a stay, nor did it find the district court abused its discretion when it dismissed, rather than stayed Ford's mixed petition, though a reading of petitioner's brief most assuredly suggests otherwise. Most significantly, the Ninth Circuit's

analysis was explicitly "not affected" by the availability of the stay and abeyance procedure. Pet. App. 26. Also, the sole issue certified on appeal in the proceedings below concerned the statute of limitations – specifically, whether Ford's federal habeas petitions were timely under AEDPA's one-year statute of limitations. *Id.* at 21. It was in that context the Ninth Circuit held the district court was required to apprise Ford, who was proceeding pro se, of his *options* with respect to his mixed petitions where dismissal could jeopardize claims potentially barred by AEDPA's statute of limitations. Pet. App. 3, 25. Respecting that issue, that was all the Ninth Circuit decided. *Ford v. Hubbard,* 330 F.3d 1086 (9th Cir. 2003), while *approving* the stay procedure as an alternative to dismissing the petition in its entirety when valid claims would otherwise be forfeited, formally left the district court with the *discretion* to follow that procedure, but did not explicitly address the propriety of that procedure, or *require* that it do so. *See id.* at 26.

Despite the fact the Ninth Circuit was not presented with and did not *decide* whether a stay was a proper alternative to dismissing the petition in its entirety, and despite the fact the validity of the Ninth Circuit's stay procedure is not among the questions presented in the petition for certiorari, *see* Cert. Pet. 1, petitioner nonetheless uses this case as a forum to rail against the appropriateness of that procedure. The most aggressive of petitioner's contentions – that a stay is contrary to AEDPA and anything short of "total exhaustion" is improper – are *not* at issue and need be rejected if for no other reason than the fact petitioner has waived any right to raise such arguments in this Court.

B. A Stay Pending Exhaustion Effectuates The Established Rule that The Filing Of A Mixed Petition Does Not Foreclose Federal Review.[6]

In *Rose,* 455 U.S. 509 this court held that a "mixed" petition, that is, a petition raising both exhausted and unexhausted claims, should be dismissed "without prejudice," leaving the prisoner with the *choice* of returning to state court to exhaust his claims or amending or resubmitting the habeas petition to present only exhausted claims to the district court. *Id.* 514, 520.

In *Rose,* a pre-AEDPA decision, this Court anticipated its rule of exhaustion had the potential to be exercised in a manner that was unfair, with a resultant loss to a prisoner of his right to federal habeas review. As a result, it entered a rare admonition, cautioning district courts that such dismissals must be accomplished in a manner that *"does not unreasonably impair the prisoner's right to relief."* *Rose,* 455 U.S. at p. 522, italics added.

Rose thus makes explicit that what this Court wanted to achieve, and what the AEDPA now reinforces, *see* 28 U.S.C. § 2254(b)(1)(A), is the assurance that a district court will not grant relief on unexhausted claims without expense to a prisoner's right to collateral review. This is

[6] As noted, presumably because the Ninth Circuit did not actually rule on the question, petitioner did not include stay and abeyance in the questions presented in its petition for certiorari, *see* Cert. Pet. 1, but nonetheless challenges the validity of that procedure. Respondent's arguments regarding the validity of the stay procedure, are not a waiver or concession. *See United States v. Eric B.,* 86 F.3d 869, 879 n.21 (9th Cir. 1996).

not a matter of speculation. When afforded the opportunity, this Court has consistently construed governing habeas law in a manner designed to protect a prisoner's right to habeas review. *See Stewart v. Martin-Villareal,* 523 U.S. 637, 643 (1998) ("Once the federal claim has been fairly presented to the state courts, the exhaustion requirement is satisfied" and a habeas petitioner may return to federal court.) *Id.* at 644. "To hold otherwise, would mean that a dismissal of a first petition for technical procedural reasons would bar a prisoner from ever obtaining federal habeas review." *Id.* at 645; *Slack v. McDaniel,* 529 U.S. 473, 486 (2000) (dismissal under *Rose* always "contemplated that the prisoner could return to federal court after the requisite exhaustion"; *Felker v. Turpin,* 518 U.S. 651, 663-664 (1964) ("There may be circumstances where the limitation period at least raises serious constitutional questions and possibly renders the habeas remedy inadequate and ineffective".)

Before AEDPA there was no statute of limitations for the filing of federal habeas petitions, and a prisoner seeking to file a second federal petition after fully exhausting state remedies faced no time bar. Under AEDPA the prisoner has just one year. 28 U.S.C. § 2244(d). After AEDPA the *choices* remain the same, but as this case illustrates, the consequences are very different, and as a result, so are the mechanics for exhaustion. If a prisoner comes to federal court too soon, *i.e.,* with one or more unexhausted claims, and does so late in the allotted year, as did Ford, a dismissal of his mixed petition risks the loss of all of his claims because the one-year limitations period will likely expire during the time taken to initiate state court exhaustion and to return to federal court. If a prisoner does not have the opportunity to make an informed

choice as to whether to amend the petitions, and of the running of AEDPA's potential time bar, *see Duncan,* 533 U.S. 167, a "dismissal without prejudice" can be substantively transformed into a "dismissal with prejudice".[9] In this context, a stay of the exhausted claims pending exhaustion constitutes a preferable alternative where outright dismissal would otherwise jeopardize the timeliness of a collateral attack. *See id.* at 183 (Stevens, J., with whom Souter, J., joins, concurring in part and in the judgment). Viewed in context, the advisements required by the Ninth Circuit when a prisoner files a mixed habeas petition, properly address this Court's concerns for exhaustion on the one hand and preservation of federal writ review on the other in compliance with *Rose,* while doing so a manner that is without undue burden to the district courts.

Showing no regard, let alone recognition for *Rose's* fairness prong, petitioner myopically and improperly focuses its challenge on the first of *Rose's* tandem rules, "total exhaustion," and does so in the most draconian of ways: contending complete and unequivocal dismissal of

[9] As Justice Breyer explained in *Duncan,* 533 U.S. at 186, 57 percent of federal habeas petitions are dismissed for failure to completely exhaust state remedies. Citing U.S. Dept. of Justice, Office of Justice Programs, Bureau of Justice Statistics, Federal Habeas Corpus Review: Challenging State Court Criminal Convictions 17 (1995) (hereinafter Federal Habeas Corpus Review). And it can take courts a significant amount of time to dispose of even those petitions that are not addressed on the merits; on the average, district courts took 268 days to dismiss petitions on procedural grounds. *Id.* Thus, a prisoner who files a petition within the AEDPA limitations period, will often have his petition dismissed as mixed only after the period has expired – which is exactly what happened to Ford.

Ford's mixed petitions in their entirety and without advisements are required. Pet. Br. 17-19 ("The possibility that a refiled petition might be time-barred does not dictate a contrary result."). This is simply wrong. *Rose* explicitly affords a prisoner "*the choice* of returning to state court to exhaust his claims or amending or resubmitting the habeas petition to present only exhausted claims to the district court." *Rose,* 455 U.S. at 510, italics added. At a minimum Ford was entitled under *Rose* to withdraw his unexhausted claims from his mixed petition and to proceed with his exhausted claims. *Id.* at 520.

Nor is there any basis for petitioner's contention the stay procedure endorsed by the Ninth Circuit for the handling of mixed petitions conflicts with *Rose. See* Pet. App. 26. *Rose* had no occasion to consider alternative procedures for accomplishing total exhaustion. The issue there was only whether the habeas court should proceed to adjudicate a mixed petition. *See Rose,* 455 U.S. at 513 n.5. Petitioner's contrary contention, that outright dismissal of a mixed petition is the *only* proper course of action under *Rose,* notwithstanding AEDPA's newly imposed limitation period, finds no support in *Rose.* Pet. Br. 17.

Petitioner's more sustained contention, indeed, it's principal theme, and one made without regard for the issue upon which certiorari was granted (the validity of the advisements), centers around the propriety of the *disposition* recommended by the Ninth Circuit for Ford's mixed petitions. It contends a stay of a mixed petition pending exhaustion is improper, therefore no error was committed when the district court failed to inform Ford about his options with respect to his mixed petitions and to the fact a portion of the one-year limitation period of AEDPA had already elapsed. The procedure endorsed, it

contends, and the advisements relative to it, is improper because it defies congressional intent, is at logger-heads with this Court's decisional law, and subverts AEDPA's limitation periods. As to each of these contentions, petitioner is incorrect.

There is no question district courts have the inherent authority to issue stays in proceedings before them. *See Landis v. North American Co.,* 299 U.S. 248 (1936); *Arkadelphia Co. v. St. Louis Southwester Ry. Co.,* 249 U.S. 154, 146 (1919) (The power to stay proceedings is "inherent in every court" so long as it retains control of the subject matter and of the parties); *Enelow v. New York Life Ins. Co.,* 293 U.S. 379, 381 (1935) (The authority to stay proceedings is appropriately used "to control the progress of the cause so as to maintain the orderly processes of justice"). The petitioner offers no reason, and there is nothing to suggest this authority does not apply in the habeas context. As Justice Stevens noted in his concurring opinion in *Duncan,* "in our post-AEDPA world, there is no reason why a district court should not retain jurisdiction over a meritorious claim and stay further proceedings pending the complete exhaustion of state remedies." *Duncan,* 533 U.S. at 182-83 (Stevens, J., concurring in part and concurring in the judgment) (citation omitted).)

As the Ninth Circuit properly recognized, allowing district courts to stay mixed petitions not only effectuates *Rose,* it properly advances a significant purpose of AEDPA – to afford state prisoners their right to federal habeas review lest dismissal otherwise jeopardize the timeliness of a collateral attack. (Pet. App. 22, 25; citing *Zarvela v. Artuz,* 254 F.3d 374, 380 (2nd Cir. 2001); *Freeman v. Page,* 208 F.3d 572, 576 (7th Cir. 2000); *Nowaczyk v. Warden, New Hampshire State Prison,* 299 F.3d 69, 79 (1st Cir. 2002); *Palmer v. Carlton,* 276 F.3d 777, 781 (6th Cir. 2002).

Petitioner also argues a stay is prohibited by AEDPA, but petioner can offer no support nor is there anything to suggest Congress intended to inhibit that authority when it enacted AEDPA in 1996. Pet. Br. 20-23. This is apparent from the fact the only way in which Congress altered the mechanics for handling a mixed petition was to authorize denial of a habeas petition on the merits if the petition contained unexhausted claims. *See* 28 U.S.C. § 2254(b)(2); *Lindh v. Murphy,* 521 U.S. 320, 333 n.7 (1997) (AEDPA provision newly authorized federal courts to reject unexhausted claim on merits). Congress, of course, could have precluded stay and abeyance if it wished to do so. *Hartford Underwriters Ins. Co. v. Union,* 530 U.S. 1, 6 (2000); *see also Williams v. Taylor,* 529 U.S. 420, 431 (2000). That Congress said nothing about stay and abeyance, evinces an intent to permit district courts to stay a mixed petition pending exhaustion. *Bates v. United States,* 522 U.S. 23, 29-30 (1997) (Congress acts intentionally and purposely in the disparate inclusion or exclusion of particular words) quoting *Russello v. United States,* 464 U.S. 16, 23 (1983).

Betraying a fundamental misunderstanding of the rule it seeks to invoke, petitioner also contends stay and abeyance contravenes this Court's admonition that federal courts have a "virtually unflagging obligation to exercise the jurisdiction given them." Pet. Br. 23, citing *Colorado River Water Conservation Dist. v. United States,* 424 U.S. 800, 817-18 (1976). If one should question the need for federal collateral review requirements that merit such respect, the answer simply is that the respect is sustained in no small part by the existence of such review. ("It is the occasional abuse that the federal writ of habeas corpus stands ready to correct.") *Jackson v. Virginia,* 443 U.S. 307, 322 (1979). A stay accommodates the abstention

concerns in *Colorado River* because the court is not dismissing the petition but is only staying the exercise of its power. "[U]nlike the outright dismissal or remand of a federal suit . . . an order merely staying the action does not constitute abnegation of judicial duty. On the contrary, it is a wise and productive discharge of it. There is only postponement of decision for its best fruition." *Quackenbush v. Allstate Insurance Co.,* 517 U.S. 706, 716 (1966). *Colorado River* thus supports a stay over a *Rose* dismissal because the district court is abstaining from deciding exhausted claims whenever it dismisses a petition with unexhausted claims. Ironically, the rule of total exhaustion advocated by petitioner results in the very divestiture of the jurisdiction it contends the court should retain.

Moreover, the contention a stay pending exhaustion contravenes *Duncan* by permitting AEDPA's limitations period to be tolled during the pendency of a federal habeas proceeding, Pet. Br. 13, 16-17, is easily dispelled. First, the petitioner's reading of AEDPA's tolling provision assumes a stay has the same effect as would tolling AEDPA's statute of limitations during federal as well as state proceedings, a contention expressly rejected by the *Duncan* Court. *See Duncan,* 533 U.S. at 181 (reserving questions). Second, the discretionary nature of a stay distinguishes it from automatic operation of a statutory tolling provision. Third, *Duncan* does not govern as it was explicitly limited to an interpretation of the relevant tolling provision and did not pass on the stay procedure endorsed by Justices Stevens and Souter. *Id.* at 181-182. A case of course, is not authority for a proposition not decided. *R. A. V. v. City of St. Paul,* 505 U.S. 377, 386, n.5 (1992) (it is "contrary to all traditions of our jurisprudence

to consider the law on this point conclusively resolved by broad language in cases where the issue was not presented or even envisioned"); *United States v. Stanley,* 483 U.S. 669, 680 (1987) ("no holding can be broader than the facts before the court"). Fourth, petitioner misconstrues the distinction between a stay of proceedings and tolling under section 2244(d)(2). Under petitioner's view a stay of proceedings is inappropriate if it would avoid what otherwise would be a time bar. But in fact the opposite is true; a stay is called for precisely because it would avoid what otherwise would be a statute-of-limitations problem. *Wilton v. Seven Falls Co.,* 515 U.S. 277 (1995); *Deakins v. Monaghan,* 484 U.S. 193, 202 (1988). Petitioner's contrary theory, that a statute of limitations is somehow at odds with a district court's inherent authority to stay an action, therefore finds no support in the decisional law and there is substantial law to the contrary. Fifth, this Court's ruling in *Duncan* does not bear on this issue because here, unlike the situation in *Duncan,* the time period was violated unless there was equitable tolling for the state proceedings, even if the time during which Ford's first federal habeas petitions were pending are taken into account. *Duncan,* 533 U.S. 167.

Nor does a stay of a perfected petition offend *Rose* or the legislative objectives of comity, finality and federalism the exhaustion requirement serves. *Woodford v. Garceau,* 538 U.S. 202, 206 (2003) quoting *Williams v. Taylor,* 529 U.S. 420, 436 (2000). *Rose* holds that a federal district court may not consider a habeas claim until after it has been fairly presented to the state courts. *Rose,* 455 U.S. at 515. ("[I]t would be unseemly in our dual system of government for a federal district court to upset a state court conviction without an opportunity to the state courts to

correct a constitutional violation.") Federal courts apply the doctrine of comity, which "teaches that one court should *defer* action on causes properly within its jurisdiction *until* the courts of another sovereignty with concurrent powers, and already cognizant of the litigation, have had an opportunity to pass upon the matter." *Id.* at 518, quoting *Darr v. Burford,* 339 U.S. 200, 204 (1950) (italics added); *see also O'Sullivan v. Boerckel,* 526 U.S. 838, 844 (1999).[10] A stay counsels in favor of, not against the principles of comity discussed in *Rose* by "defer[ring] to the state court action" as to unexhausted claims.

While petitioner's argument assumes a congressional desire to obtain expeditious federal review and achieve finality, the alternative to a stay of exhausted claims in mixed petitions which it proposes is hardly salutary. It involves the filing of a "protective" petition in state court in order to trigger AEDPA's state-court tolling provision. Pet. Br. 18 n.5, citing *Atkins v. Kenney*, 341 F.3d 681 (8th Cir. 2003). In this manner, petitioner can "toll," the proceedings and there will still be time to refile in federal court after a dismissal of a mixed petition. *Id.* Without question, this imposes needless burdens upon state courts in derogation to the comity interests at the core of the *Rose* dismissal requirement. *See Rose,* 455 U.S. at 518 (citation omitted). ("The exhaustion doctrine is principally designed to protect the state courts' role in the enforcement of

[10] Because the Ninth Circuit has held that principles of comity and judicial economy mandate dismissal of any unexhausted claims, Pet. App. 22-23; and *see Rose,* 455 U.S. at 518-20, contrary to petitioner's contention, those principles are not applicable to Ford's exhausted claims, since the state courts already had an opportunity to consider those issues raised in his mixed federal petition.

federal law and prevent disruption of state judicial proceedings"). Other options, equally unfeasible, involve a shifting of the burdens to the federal courts to expedite consideration of habeas petitions on the merits. R. Hertz & J. Liebman, 1 *Federal Habeas Practice and Procedure* § 5b at 274 (4th ed. 2001). Under that scenario, it is possible that courts, understanding dismissal for nonexhaustion could bar the prisoner from ever obtaining federal habeas review where the refiled petition is time-barred, may tend to resolve those issues in favor of finding the exhaustion requirement has been satisfied simply to avoid imposing a dismissal where prisoners have acted in good faith. For similar reasons, they may reach the merits of a federal petition's claims without sending the petitioner back to state court for exhaustion, again undermining the comity interests at stake.

Finally, petitioner's sturm und drang is that stay and abeyance will encourage the abuse of habeas corpus that results from delayed and repetitive filings (Effective Death Penalty Act of 1995, H. Rep. No. 104-23, 104th Cong., 1st Sess., 9 (1995)), but offers no empirical basis for projecting that consequence. Rather, the contrary is more likely true. It is unlikely prisoners will deliberately seek to delay by repeatedly filing unexhausted petitions in federal court, as the petitioner suggests. Pet. Br. 32-33, 35-36. Prisoners not under a sentence of death (the vast majority of habeas petitioners) have no incentive to delay adjudication of their claims. Rather, "[t]he prisoner's principal interest . . . is in obtaining speedy federal relief." *See Rose,* 455 U.S. at 520.

The premise that stay and abeyance will lead to vexatious litigation is unlikely for the still further reason that AEDPA was expressly designed to deter such abuse.

The prisoner who chooses to go into federal court with unexhausted claims runs the risk the district court will simply deny those claims on the merits, thereby subjecting any subsequent petition the petitioner may attempt to file to the extremely rigorous second or successive application requirements contained in § 2244(b). 28 U.S.C. § 2254(b)(2); *Duncan,* 533 U.S. at 182-83 (Stevens, J., concurring). Clearly, no prisoner with even the most rudimentary understanding of habeas procedure, would view the real possibility of a denial on the merits and its attendant second or successive petition consequences a risk worth taking merely "to hold the federal proceedings 'hostage' and delay adjudication of their federal law claims." Pet. Br. 20, 21.

District courts also have the power to prevent vexatious repeated filings by, for instance, ordering that a petition filed after a mixed petition is dismissed must contain only exhausted claims, *see Slack,* 529 U.S. at 489, or to dismiss mixed petitions on the merits if they raise insubstantial claims. (28 U.S.C. § 2254(b)(2); *see Duncan,* 533 U.S. at 182-83 (Stevens, J., concurring).) Finally, the Federal Rules of Civil Procedure, applicable to habeas proceedings, provide the federal courts with alternative ways to stop vexatious practitioners. (*See* discussion, *infra* at section II.) A rule which would preclude a district court from retaining jurisdiction pending complete exhaustion, therefore provides no additional incentive whatsoever to consolidate all grounds for relief in one § 2254 petition.

In two recent cases, this Court assumed that Congress did not want to deprive state prisoners of first federal habeas corpus review, and this Court has interpreted statutory ambiguities accordingly. In *Stewart,* 523 U.S. 637, this Court held that a federal habeas petition filed

after the initial filing was dismissed as premature should not be deemed a "second or successive" petition barred by § 2244, lest "dismissal . . . for technical procedural reasons . . . bar the prisoner from ever obtaining federal habeas review." *Id.* at 645. And in *Slack v. McDaniel,* this Court held that a federal habeas petition filed after dismissal of an initial filing for nonexhaustion should not be deemed a "second or successive petition," lest "the complete exhaustion rule" become a "'trap'" for "'the unwary pro se prisoner.'" 529 U.S. at 487 (quoting *Rose,* 455 U.S. at 520). Making the same assumption here, would militate in favor of stay procedures for federal habeas petitions.

On the other hand, the position advocated by petitioner would bar Ford, who simply followed the options he was given, from raising the exhausted claims asserted in the initial petitions as well as the nonfrivolous claims developed in the second state exhaustion proceedings contemplated by the *Rose* dismissals, though a federal court had yet to review a single constitutional claim. This result would be contrary to this Court's admonition that the complete exhaustion rule is not to "trap the unwary pro se prisoner." *Ibid.,* internal quotation marks omitted. *Slack,* 529 U.S. at 487.

Abrogation of a court's equitable power to stay as advocated by petitioner would totally undermine this Court's decisions in *Rose* and *Slack* and create precisely the same trap for Ford, the "unwary pro se prisoner" which this Court has condemned and which the Ninth Circuit sought to avoid by the required advisements. Instead of Ford's habeas corpus petitions being dismissed because they were mixed, dismissals of the exhausted petitions would instead be affirmed on limitations grounds, if the argument put forth by petitioner is

adopted. Such a result would not further the interests the AEDPA was designed to address and would create a situation in which "a dismissal of a first habeas petition for technical procedural reasons would bar the prisoner from ever obtaining federal habeas review," something this Court has sought to avoid. *Stewart,* 523 U.S. at 645.

The stay procedures adopted by the lower courts constitute a reasonable and proper mechanism for handling mixed claims. Inapposite to the petitioner's contention, the Ninth Circuit's stay procedure and as a necessary corollary, the advisements relative to it, does not conflict with but instead effectuates the mandate of AEDPA and this Court by insuring a pro se petitioner such as Ford, who has proceeded diligently and in good faith, does not lose the opportunity to have his claims heard on the merits.

Returning to the facts of this case, this Court should reject petitioner's attack on the stay procedure adopted by the Ninth Circuit and the advisements relative to it, and affirm the decision below.

Ford acted with due diligence, filing timely habeas petitions that included exhausted as well as unexhausted claims. He also contemporaneously filed motions to stay. Following the only procedure of which he was aware, he relied on the district court's assurances that dismissal would be "without prejudice," elected to dismiss, expeditiously pursued his state post-conviction remedies, and expeditiously returned to federal court after fully exhausting his state claims, only to find he was time barred. Most assuredly, this is a classic case of "damned if you do, damned if you don't."

In recognition that a district court must dismiss a habeas petition containing unexhausted claims, *Rose,* 455 U.S. at 509, the Ninth Circuit held that the dismissals of Ford's mixed petitions were improper where the district court failed to inform Ford, who was proceeding pro se, of his options with respect to his mixed petitions and to the fact that a portion of the one-year limitations period of AEDPA had already lapsed. Ford and the Ninth Circuit acknowledged there was a procedural deficiency – the filing of mixed habeas petitions – that prevented the district court from *considering* Ford's stay motions. To correct that deficiency, Ford was required to amend his habeas petitions to dismiss the unexhausted claims and proceed with only the exhausted claims, and then seek a hearing on the motions to stay the exhausted claims. However, when given a choice of his options, the magistrate judge neither informed Ford of this fact, and Ford did not withdraw his unexhausted claims to perfect his stay motions. Pet. App. 14.

At a minimum, the district court's outright dismissal of Ford's mixed petition without having adequately informed him of his options was improper given that the statute of limitations had already run while Ford's first petitions were pending in the district court, and the granting of a stay was the only appropriate remedy where outright dismissal would otherwise jeopardize the timeliness of a collateral attack. For this reason the decision of the Ninth Circuit should be affirmed.

Yet even if this Court rejects the stay procedure, affirmance is nonetheless required. *Rose* plainly commands that a prisoner be given "*the choice* of returning to state court to exhaust his claims or amending or resubmitting the habeas petition to present only exhausted claims

to the district court." *Rose*, 455 U.S. at 510, italics added. There is no question Ford was entitled under *Rose* to withdraw his unexhausted claims and to proceed with his exhausted claims. However, as the court below correctly held, that right is meaningful only if a pro se prisoner litigant is advised that his other "choice", dismissal of the entire petition for complete exhaustion may preclude federal habeas review because a portion of the AEDPA limitations period had already run. This Court should affirm the Court of Appeals' holding that a district court must advise a prisoner of the potential AEDPA time bar in order to make the prisoner's choice a meaningful one.

Obviously the choices offered, were not real choices at all, which leads to another point; the Court should also affirm the Court of Appeals' holding that Ford was entitled to relief for the improper dismissal of his first petitions without the necessary advisements. The magistrate judge gave Ford who was proceeding pro se, what was in effect a Hobson's choice: either withdraw his unexhausted claims and proceed only on the exhausted ones, or to dismiss his petitions in their entirety and "without prejudice" so he could return to state court and exhaust his then-unexhausted claims. But at the time the AEDPA's limitation period had already expired by more than four months, so, absent equitable tolling, federal review of *all* of Ford's claims, including those already exhausted, were barred if he chose to dismiss. As the Ninth Circuit found, the district court's offer of dismissal "without prejudice", definitively, although not intentionally, misled Ford into believing dismissal for complete exhaustion was a viable

alternative to proceeding with his exhausted claims, when it fact it was not.[11]

For the reasons given, this Court should affirm the decision below.

C. This Court Should Affirm The Court Of Appeals' Holding That A Magistrate Or District Judge Must Advise A Prisoner Of His Options and The Potential AEDPA Time-Bar In Order To Make The Prisoner's Choice Under *Rose A* Meaningful One.

While petitioner contends the Ninth Circuit's advisement requirements run afoul of *Rose* and AEDPA, Pet. Br. 23, the contrary proposition is in fact true. The advisements required by the majority simply implement what this Court *already* requires. Before a mixed petition is dismissed, *Rose* requires that a prisoner be given "*the choice* of returning to state court to exhaust his claims or amending or resubmitting the habeas petition to present only exhausted claims to the district court." *Rose*, 455 U.S. at 510, italics added. *Castro* holds that advisements may be necessary in the habeas context to insure that pro se prisoners can make informed judgments and do not inadvertently forfeit their rights. *See Castro*, 124 S. Ct.

[11] Petitioner relies heavily on the fact Ford did not appeal from the denial of his first petitions. There was no reason to do so; as a result of the district court's deceptive advice, Ford was led to believe he could return to federal court upon exhaustion. Where a dismissal is "without prejudice," there is no reason a pro se litigant will seek to contest it on appeal. *See Castro*, 124 S. Ct. at 793.

791-92. As this Court necessarily concluded in *Rose,* to avoid unwarranted unfairness, dismissals for want of exhaustion must be accomplished in a manner that "does not unreasonably impair the prisoner's right to relief." *Rose,* 455 U.S. at 522. Forcing pro se prisoner litigants to make a choice, without any corresponding information relative to that choice, impairs their ability to competently represent themselves, is unfair, and virtually guarantees a forfeiture of the very right to federal habeas review which *Rose* and *Castro* sought to protect.

The Ninth Circuit's decision was properly animated by such concerns. Cognizant that the rights of pro se prisoner litigants require careful protection where highly technical requirements are involved, especially when enforcing those requirements might result in the loss of the opportunity to prosecute or defend a lawsuit on the merits, Pet. App. 24; *see Conley v. Gibson,* 355 U.S. 41, 48 (1957); *Foman v. Davis,* 371 U.S. 178, 181 (1962), the notification and election procedure approved by the Ninth Circuit, which requires the district court to notify a pro se prisoner litigant his petition contains unexhausted claims, to warn the prisoner of his limitations period status, and to permit him to choose either to amend the petition to delete unexhausted claims, or to accept a dismissal, fulfills the objectives of exhaustion in a manner that does not unreasonably impair the prisoner's right to relief.[12] Proceeding

[12] This Court and several federal courts of appeal have adopted an analogous procedure to warn federal prisoners about the consequences of a district court's recharacterization of a post-trial pleading as a motion for relief pursuant to 28 U.S.C. § 2255, and to allow those prisoners to make an informed determination as how to proceed. *See, e.g., Castro,* 124 S. Ct. at 786; *United States v. Evans,* 224 F.3d 670, 675

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without such basic procedural safeguards would create an unacceptable risk of trapping large numbers of prisoners into unwittingly sacrificing their first and only opportunity for federal habeas review. *Longchar v. Thomas,* 517 U.S. 314, 324 (1996) ("Dismissal of a first federal habeas petition is a particularly serious matter, for that dismissal denied the petitioner the protections of the Great Writ entirely, risking injury to an important interest in human liberty").

Critical to the Ninth Circuit was the fact Ford was proceeding pro se. There is no right to counsel in habeas proceedings, *Coleman v. Thompson,* 501 U.S. 722, 757 (1991); *Pennsylvania v. Finley,* 481 U.S. 551 (1987); *Wainwright v. Torna,* 455 U.S. 586 (1982); *Ross v. Moffitt,* 417 U.S. 600 (1974); *Johnson v. Avery,* 393 U.S. 483, 488 (1969), and Ford's petitions, like the vast majority of federal habeas petitions, were not prepared by counsel. *See* Federal Habeas Corpus Review 14 (finding that 93% of habeas petitioners in study were *pro se).* "Unskilled in law, unaided by counsel, and unable to leave the prison" incarcerated pro se litigants have little control over litigation. *Houston v. Lack,* 487 U.S. 266, 271 (1988).

Certain responsibilities attend a federal court in regard to pro se prisoner litigants. For instance, federal courts sometimes will ignore the legal label that a *pro se* litigant attaches to a motion and recharacterize the motion in order to place it within a different legal category.

(7th Cir. 2000); *United States v. Miller,* 197 F.3d 644, 652 (3d Cir. 1999); *Adams v. United States,* 155 F.3d 582, 584 (2nd Cir. 1998) (per curiam).

See, e.g., Haines v. Kerner, 404 U.S. 519, 520 (1972) (holding that allegations of *pro se* complaints are held to "less stringent standards than formal pleadings drafted by lawyers"). In *Castro*, this Court concluded a district court may not recharacterize a *pro se* litigant's motion as a request for relief under § 2255 – unless the court first warns the *pro se* litigant about the consequences of the recharacterization, thereby giving the litigant an opportunity to contest the recharacterization, or to withdraw or amend the motion. *See also Castro v. United States,* 124 S. Ct. 791-92.

Pro se prisoner litigants are held to the same standard as counsel, which is that of reasonably effective assistance under prevailing professional norms, *Strickland v. Washington,* 466 U.S. 668, 687-688 (1984); *Cuyler v. Sullivan,* 446 U.S. 335, 344 (1980), and their ineffectiveness or incompetence in the context of federal collateral post-conviction proceedings is not a ground for relief. 28 U.S.C. § 2254(i).

In *Strickland*, this Court agreed that reasonably effective assistance must be based on professional decisions and informed legal choices can be made only after thorough investigation of law and facts relevant to plausible options. *Wiggins v. Smith*, 123 S. Ct. 2527, 2535 (2003) citing *Strickland v. Washington*, 466 U.S. at 673. *Rose* explicitly admonished that the total exhaustion rule must be accomplished in a manner that "does not unreasonably impair the prisoner's right to relief." *Rose,* 455 U.S. at 522. The Ninth Circuit's advisement requirements regarding its stay procedure and AEDPA's limitation period simply and without substantial burden fulfill these prudential concerns.

Petitioner's contention the Ninth Circuit's advisement requirements are inappropriate, "gives fresh meaning to the phrase, '[We're] from the government and [we're] here to help you.'" Pet. Br. 23; *United States v. Gomez,* 92 F.3d 770, 772 (9th Cir. 1996). As *Strickland* and *Wiggins* make clear, in order for a pro se prisoner to adequately represent himself, he must be given sufficient information regarding the available options and their consequences in order that his election is an informed one. Absent advisements, a prisoner's ability to make such a decision and to competently represent himself are impaired.

A prisoner's ability to effectively navigate through AEDPA's procedural complexities would thus depend on a prisoner's awareness of the existence of such alternatives or on a sympathetic district judge who informs a prisoner of his options, in derogation to another of this Court's admonitions that the rights of pro se litigants require careful protection. *Ibid.* Subjecting pro se prisoner litigants who file in good faith to permanent loss of the right to seek habeas relief because they do not understand the options available to them would thwart the clear intention of this Court to preserve the right to federal habeas review in contravention to *Rose's* second requirement. *See Castro v. United States,* 124 S. Ct. 791-92. Were this Court to ratify petitioner's view, the longstanding rule of *Rose* would be seriously jeopardized.

This Court should affirm the Court of Appeals' holding that a magistrate or district judge must advise a prisoner of his options with respect to a mixed petition and of AEDPA's time bar and to the fact that a portion of it may have already elapsed. Pet. App. 27-30. These advisements are mandated by this Court's own case law which recognizes it is the court's responsibility to protect the rights of

a pro se litigant where highly technical requirements are involved, especially when enforcing those requirements might result in a forfeiture of the right to federal habeas review of timely-filed and exhausted constitutional claims. Anything less would make the prisoner's choice meaningless, would thwart the right to federal habeas review in derogation to AEDPA's principal purpose, and would undermine the protections that extend to pro se prisoner litigants.

D. The Rights Advisements Which Amount To An Identification Of Time Bars Required By The Ninth Circuit Do Not Impose Substantial Burdens On The District Courts.

According to petitioner, the decision reached by the Ninth Circuit constitutes an unwarranted expansion of existing decisional law. By requiring district courts to inform habeas petitioners that their federal claims may be time-barred "if [they] opt[] to dismiss the petitions 'without prejudice' and return to state court to exhaust all of their claims," it contends the Ninth Circuit has visited burdens of unparalleled complexity upon the district court. Not only would the district court be required to dispense correct legal advice regarding the applicability of the statute of limitations, it complains, it also would be required to calculate the limitations deadline, a positively Sisyphean task, and the district courts would be required to act as "advocates". Pet. Br. 23-25; Pet. App. 42. Viewed realistically, petitioner "makes much ado about nothing."

In its apparent zeal to establish error worthy of reversal, petitioner has grossly mischaracterized the holding reached by the Ninth Circuit. The court merely requires the district judge to notify a pro se plaintiff of the

existence of the AEDPA limitation and the fact part or all of the period, whichever is the case, has already run, a relatively simple task. Pet. App. 28-30, n.8. "This simple step helps avoid the unnecessary forfeiture of petitioners' constitutional rights." *Id.* at 28.

This Court has ordered relief in cases under circumstances where a party has been misled by another party. Cf. *Irwin v. Department of Veterans Affairs,* 498 U.S. 89, 96 (1990) (equitable tolling was available where a complainant had been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass). Here, the misleading nature of the advisements were even more egregious than those committed in *Irwin.* It was the *district court,* the very party chargeable with protecting Ford's rights, not an adversary who misled Ford about the current status of his claims under the AEDPA one-year statute of limitations and thus deprived him of the opportunity to make a "meaningful" choice among his options. *Id.* at 27-28. "[T]he district court's failure fairly or fully to explain the consequences of the options it presented to Ford deprived him of the opportunity to make a meaningful choice. . . ." *Id.* at 29.

As even the most seasoned of lawyers knows, AEDPA is a confusing, at times impenetrable statute. It imposes stringent procedural rules on habeas petitioners, with often harsh results. To alleviate the burden on pro se litigants, the Ninth Circuit has followed this Court and the Second and Third Circuits in requiring district courts to provide mandatory prophylactic "notice" measures to advise pro se petitioners of the consequences of certain AEDPA procedural provisions that may foreclose consideration of their claims on the merits. *See Castro,* 124 S. Ct. 791-92; *Adams,* 155 F.3d at 584 (per curiam) (mandatory

warning regarding consequences of "second or successive petition" rule when recharacterizing motions under § 2255); *United States v. Miller,* 197 F.3d 644, 646, 652 (3d Cir. 1999) (same); *Mason v. Meyers,* 208 F.3d 414, 418 (3d Cir. 2000) (same, under § 2254). *Rose* already requires a prisoner to be apprised of his options. The decision reached by the Ninth Circuit does nothing more than insure that those options and their consequences are accurately explained. (*Id.* at 29, n.8.)

Other circuits have noted the deceptive nature of a dismissal without prejudice when the claims dismissed are time-barred, and require similar advisements. In *Rodriguez v. Bennett,* 303 F.3d 435 (2nd Cir. 2002), the Second Circuit explained that for a petitioner dismissed "without prejudice" after a year in federal habeas proceedings, the "without prejudice" provision was an illusion; petitioner could never succeed in timely refiling the petition because he would already be time-barred. (*Id.* at 439.) In *Valerio v. Crawford,* 306 F.3d 742 (9th Cir. 2002), the en banc court instructed the district court to inform a petitioner when claims to be dismissed "without prejudice" would actually be time-barred. In *Zarvela,* a case in which the AEDPA period had not yet run, the Second Circuit held that a district court, when informing a habeas petitioner of his options with respect to a mixed petition should "alert the petitioner to the one-year limitations period of AEDPA and to the fact that a portion of that period has already elapsed." *Zarvela*, 254 F.3d at 382; Pet. App. 28-29.

While petitioner contends a ruling in Ford's favor would require district courts to determine the expiration date under AEDPA for each habeas corpus petition that is filed and to explain to any petitioner, who of his own volition chooses to dismiss his petition that AEDPA may

prevent refiling at a later date, Pet. Br. 24-25, the Ninth Circuit's decision in *Ford* cannot be so broadly construed. The Ninth Circuit does not require a district judge to advise a pro se petitioner how to proceed. It does not require a district court judge to advise a pro se petitioner about every possible factor that could affect his decision, and it does not require the district judge to calculate the limitations period. Nor does it turn the district court into the petitioner's paralegal or "blur[] the distinction between impartial decision-making and advocacy." Pet. App. 13. It merely requires the district court to inform a pro se habeas petitioner of the *existence* of the AEDPA one-year limit and the fact that a portion of that period has already lapsed; a relatively simple task. Pet. App. 29, n.8. To accurately explain this option, the judge must inform the petitioner if, on the face of the complaint, the AEDPA statute of limitations has expired that any dismissal of the mixed petition would necessarily be "with prejudice," absent equitable tolling. *Ibid.* To do otherwise affirmatively misleads the pro se petitioner about his options available to him. *Ibid.* Given the important legal interests at stake, the holding of the court is not draconian, it does not impose a substantial burden on district courts – *Rose* already requires that a prisoner be apprised of his options – and it certainly does not call for district courts to act as "advocates".

Under Petitioner's approach, if a *pro se* prisoner litigant unwittingly includes in a § 2254 motion a claim not yet presented to the state courts, he risks dismissal of the entire petition without being apprised of his available options. A prisoner's opportunity to amend a § 2254 petition would thus depend on his awareness of technical legal requirements or run the risk of outright dismissal,

which would render it unlikely or impossible to pursue a timely collateral attack. The decision of the majority simply prevents the state from exploiting a *pro se* prisoner who is not knowledgeable about the intricacies of the exhaustion doctrine and whose only aim is to secure a new trial or release from prison through federal review by requiring compliance with certain minimal safeguards. This Court should affirm the Court of Appeals' holding that Ford was entitled to relief for the improper dismissal of his first petitions without the necessary advisements. Pet. App. 31-33.

II. THE NINTH CIRCUIT'S INTERPRETATION OF FEDERAL RULE OF CIVIL PROCEDURE 15(c) IS NOT CONTRARY TO LAW.

A. The Relation Back Doctrine Applies to Habeas Proceedings.

Petitioner contends the "relation back doctrine" of Rule 15(c) of the Federal Rules of Civil Procedure does not apply to habeas proceedings, is inconsistent with AEDPA's design to expedite the federal habeas process and circumvents the AEDPA's one-year limitations period. None of these contentions has merit.

Petitioner insists that Rule 15(c) cannot apply to habeas corpus cases in light of AEDPA, because allowing relation back of otherwise time-barred claims is inconsistent with the legislative intent that the rules have very limited application to habeas corpus proceedings and to Rule 15(c) in particular. Pet. Br. 30-32. It is of some relevance that *Harris v. Nelson,* 394 U.S. 286, 296 (1969), on which petitioner relies for that proposition, refers not to the relation back doctrine but refers instead to the

inapplicability of the discovery provisions of the Federal Rules to habeas corpus proceedings.

While petitioner contends Rule 15(c) does not apply to post-AEDPA habeas corpus proceedings, there is no reason, why it should not apply. 28 U.S.C. § 2242 states that applications for habeas corpus "may be amended or supplemented as provided in the rules of procedure applicable to civil actions." Similarly, Rule 11 of the Rules Governing Section 2254 Cases in the United States District Courts states that "[t]he Federal Rules of Civil Procedure, to the extent that they are not inconsistent with these rules, may be applied, when appropriate, to the petitions filed under these rules." The § 2254 rules do not consider whether an amended petition can relate back to the filing date of the original; Rule 15(c) of the civil-procedure rules therefore governs. Petitioner has cited to no authority that supports the proposition that AEDPA renders Rule 15 inapplicable to federal habeas corpus proceedings, and there is substantial authority to the contrary. *See, e.g., Withrow v. Williams,* 507 U.S. 680, 696 n.7 (1993); *Calderon v. Ashmus,* 523 U.S. 740, 750 (1998) (Breyer, J., concurring) (under Habeas Rule 11, and unless otherwise expressly governed by statute, habeas corpus amendments are governed by Rule 15); *Ellzey v. United States,* 324 F.3d 521, 526 (7th Cir. 2003) (Easterbrook, J.); *Woodward v. Williams,* 263 F.3d 1135, 1142 (10th Cir. 2001); *Fama v. Commissioner of Correctional Services,* 235 F.3d 804, 814-16 (2d Cir. 2000); *United States v. Thomas,* 221 F.3d 430, 436 (3d Cir. 2000) (holding that Rule 15(c) applies to post-AEDPA § 2255 petitions); *United States v. Pittman,* 209 F.3d 314, 316-17 (4th Cir. 2000); *Johnson v. United States,* 196 F.3d 802, 805 (7th Cir. 1999) (because the rules governing section 2255 proceedings do not

address amendments to motions for collateral review, Federal Rule of Civil Procedure 15(a) applies); *Anthony v. Cambra,* 236 F.3d 568, 576-78 (9th Cir. 2000) (permitting amended habeas claim to "relate back" to original petition where petition put defendant on notice of amended claim); *Mederos v. United States,* 218 F.3d 1252, 1254 (11th Cir. 2000) (applying Rule 15(c) to post-AEDPA habeas petition and holding that amended pleading related back to original timely pleading); *United States v. Craycraft,* 167 F.3d 451, 457 & n.6 (8th Cir. 1999).

Nor is there any inconsistency between AEDPA's statute of limitations and Rule 15(c)'s amendment regime where, as here, the state is on notice of the claims to be raised; as Moore, a leading treatise explains, "[t]he rationale of allowing an amendment to relate back is that once a party is notified of litigation involving a specific factual occurrence, the party has received all the notice and protection that the statute of limitation requires." James Wm. Moore et al., *Moore's Federal Practice* § 15.19[1] (3d ed. 1999).[13] Here, Ford's amended petitions

[13] In considering the intended application of the Federal Rules of Civil Procedure to habeas corpus it is illuminating to note that in 1938 the expansion of federal habeas corpus to its present scope was only in its early stages. *Harris v. Nelson,* 394 U.S. at 296; *Mooney v. Holohan,* 294 U.S. 103 (1935); *Johnson v. Zerbst,* 304 U.S. 458 (1938); *Waley v. Johnston,* 316 U.S. 101 (1942). It was not until many years later that the federal courts considering a habeas corpus petition were held to be required in many cases to make an independent determination of the factual basis of claims that state convictions had violated the petitioner's federal constitutional rights. *Brown v. Allen,* 344 U.S. 443 (1953); *Townsend v. Sain,* 372 U.S. 293 (1963). In these circumstances it is readily understandable that, as indicated by the language and contemporary exegesis of Rule 15(c), the draftsmen of the rule did not

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are substantively identical to his first – the only change reflecting the disposition of the state-court proceedings – and therefore falls within the scope of the rule. *See* 6A Charles Alan Wright, Arthur R. Miller, & Mary Kay Kane, Federal Practice and Procedure § 1497 (2d ed. 1990) (amendments that merely correct technical deficiencies in earlier pleading meet the Rule 15(c) test and will relate back).

Petitioner insists however, that Rule 15(c) cannot apply to habeas corpus cases in light of AEDPA, because allowing relation back of otherwise time-barred claims would offend Congress's intent to expedite the presentation of claims in federal court. Pet. Br. 32-35. To the contrary, the purpose of Section 2244 was to promote the "exhaustion of available state remedies – which is the object of § 2244(d)(2)." *Artuz v. Bennett,* 121 S. Ct. 361, 365 (2000). To the extent Congress had concerns, these have been addressed by § 2244 which requires state prisoners a full year (plus the duration of state collateral proceedings) to file a federal habeas corpus petition.

In addition, the relation back rule affords a variety of mechanisms to deter abusive litigation and obvert delay. Under Rule 15(a), once a responsive pleading has been served, the habeas petitioner must gain leave of the court before being permitted to amend. Although, under the rule, "leave shall be freely given when justice so requires," the district court may consider whether there is any evidence of "undue delay, bad faith or dilatory motive"

expressly contemplate that 15(c) of the rules would be applicable to habeas corpus proceedings.

with respect to the filing of the amendment when determining whether leave should be granted. *Foman,* 371 U.S. at 182. So, had Ford, without explanation, waited several years, or even several months, before filing his proposed amendment, it might well have been within the district court's discretion to deny leave to amend under Rule 15(a). However, that is not the case.

Finally, there is no merit to petitioner's contention that Rule 15(c) does not apply to habeas petitions because AEDPA's limitation period is different from other statutes of limitation governing civil causes of action, since its design is to expedite the federal habeas process, particularly in capital cases. Pet. Br. 31-33. The ready explication is that AEDPA already includes a specially "strict standard" for amendment in a limited class of capital cases qualifying for "expedited review." By its terms, this does not include Rule 15(c). *See Calderon,* 523 U.S. at 750 (Breyer, J., concurring) (Rule 15's "liberal standard for amendment" applies in habeas cases outside statutorily defined group of capital cases eligible for expedited review). Section 2266 expressly provides for expedited resolution of an application under section 2254, the adjudication of any motion under section 2255, and the adjudication of a petition for writ of habeas corpus in a capital case. 28 U.S.C. § 2266. Petitioner cannot account for Congress' considered decision to restrict application of Rule 15 and the relation back doctrine in one and only one narrow category of cases.

B. Nothing in the Ninth Circuit's Application of the Relation Back Doctrine Was Improper.

Petitioner proceeds along the assumption that because Ford's original petitions were dismissed, the "relation back" doctrine simply does not apply because there is nothing for the claims to relate back to. Pet. Br. 37; *Neverson v. Bissonnette,* 261 F.3d 120, 126 (1st Cir. 2001) ("relation back" doctrine inapplicable where dismissal of initial habeas corpus petition left nothing for the new petition to relate back to); *see also Marsh v. Soares,* 223 F.3d 1217, 1219-20 (10th Cir. 2000) (collecting cases). The crucial flaw in petitioner's contention is that the federal actions should have been stayed, not dismissed, while the district court ruled on Ford's stay motions. *See also Neverson,* 261 F.3d at 126 n.3; *Zarvela,* 254 F.3d at 380; *Post v. Gilmore,* 111 F.3d 556, 557-58 (7th Cir. 1997). Since staying the action was the proper step to take in the first place, the relation back doctrine clearly applies.

The Ninth Circuit's application of the relation back doctrine was entirely proper. Expressly animated by the need to correct the procedural error which led to the dismissal of Ford's petitions in the first place, distinguishes it from *Green v. White,* 223 F.3d 1001, 1003 (9th Cir. 2000), despite petitioner's contrary contention. (Pet. Br. 37; *see* Pet. App. 33, n.13.) In *Green,* the petitioner had *accepted* the *proper* dismissal of his truly mixed petition and, after exhausting state remedies, filed his renewed petition and attempted to have it relate back to an earlier, properly dismissed petition. In that circumstance, the Court rejected the argument that the petition relates back in time as an amendment because nothing remained of the earlier proceeding. *See id.* Unlike *Green,* Ford's petitions were improperly dismissed; Ford was actively misled when

he was informed he had the option of dismissing his mixed petition without prejudice in order to return to state court to exhaust his then-unexhausted claims. Pet. App. 32-33. Moreover, Green still had almost 11 months remaining in his one-year AEDPA statute of limitations, whereas Ford had none. Pet. App. 33, n.14; *Cf. Anthony,* 236 F.3d at 574 n.1 (distinguishing *Green, Van Tran v. Lindsey,* 212 F.3d 1143 (9th Cir. 2000), and *Henry v. Lungren,* 164 F.3d 1240 (9th Cir. 1999) on the fact of acceptance). Finally, Green was represented by counsel, while Ford was proceeding pro se when he filed his first and second habeas petitions. As the Ninth Circuit emphasized, Ford's pro se status was one of the principal reasons why it held the district judge's failure to fairly and fully inform Ford about his options with respect to the mixed petitions and the stay motions constitutes prejudicial error. Accordingly, case law interpreting the acceptance of *proper* dismissals of mixed petitions is inapposite. (Pet. App. 32, *and see* Pet. App. 32-33 at nn.11-12; *Anthony,* 236 F.3d at 574; *see also Freeman v. Page,* 208 F.3d 572, 577 (7th Cir. 2000) (dismissal of mixed federal petition "is not proper when that step could jeopardize the timeliness of a collateral attack"); *Henry,* 164 F.3d at 1241, (an untimely petition may "relate back" to an earlier petition under Fed. R. Civ. P. 15(c)(2) where a district court impliedly retains jurisdiction). Ford, should be entitled to apply Rule 15(c) to his later-filed petitions.

Finally, petitioner contends that a number of other circuits have addressed the specific relation back issue presented here, namely, whether the relation back doctrine applies to a former habeas proceeding. These circuits have held that Rule 15(c) does not apply where the party

bringing suit did not seek to "amend" his original pleading, but, rather, allowed the first petition to be dismissed and then later opted to file a new petition at a subsequent date. *Neverson,* 261 F.3d at 126; *Marsh,* 223 F.3d at 1219 (holding "relation back" doctrine inapplicable when initial habeas petition had been dismissed because there was no pleading to which the new petition could relate back); *Warren v. Garvin,* 219 F.3d 111, 114 (2d Cir. 2000) (same); petition containing an entirely new claim does not relate back to the original filing date; and *see Newell v. Hanks, supra,* 283 F.3d at 834; *Nyland v. Moore,* 216 F.3d 1264, 1266 (11th Cir. 2000); *Jones v. Morton,* 195 F.3d 153, 160-161 (3d Cir. 1999).

As the holding in this case concerns whether a pro se prisoner litigant can employ the relation back doctrine to have the second petition relate back to and preserve filing date of an *improperly*-dismissed initial petition, the above-cited cases which concern an entirely different question regarding the amendment procedures of Federal Rule of Civil Procedure 15(c) are not at all applicable. As this Court has stated in the past, cases are not authority, of course, for issues not raised and resolved. *R. A. V. v. St. Paul,* 505 U.S. 377, 386, n.5 (1992) (it is "contrary to all traditions of our jurisprudence to consider the law on this point conclusively resolved by broad language in cases where the issue was not presented or even envisioned"); *United States v. Stanley*, 483 U.S. 669, 680 (1987) ("no holding can be broader than the facts before the court").

There is no question Ford was misled to his detriment.[14] The magistrate judge made dismissal of both petitions appear to be the preferred course of action. First, the magistrate judge cast the alternative – deleting unexhausted claims – in a decidedly negative light, stating that he would "not later rule" on unexhausted claims, and going so far as to require that Ford formally waive any rights to assert those claims. J.A. 52. Then, in response to Ford's express concerns about the AEDPA time bar, the magistrate judge implied the statute of limitations on at least some of Ford's claims had not run. J.A. 53 (limitation period "begins to run only when the factual predicate of the claims could have been discovered through the exercise of due diligence"). Finally, by presenting the choice so that complete dismissal was the default to which Ford had to object, Pet. App. 17, 20, the magistrate judge conveyed that dismissal was the norm.

This Court should affirm the Court of Appeals' holding that Ford was entitled to relief for the improper dismissal of his first petitions without the necessary advisements. Pet. App. 31-33. The court's decision was designed to obvert the obvious error from the misleading character of the court's advisements; in apprising Ford of his options relative to the first petitions, the magistrate judge did not

[14] It is also abundantly clear that Ford did not understand his choices, at least with the Loguercio case, and that despite its concerns, the magistrate judge simply ignored the problem. As previously noted, Ford made inconsistent elections in his Response and Traverse filed in that case. *See* n.5, *supra*. Despite the court's express recognition Ford did not understand his choices, and despite its request that Ford make a clear election, it nonetheless indicated it would construe Ford's silence as consent to dismissal of the entire petition without prejudice.

inform Ford that the AEDPA period had run which substantively transformed the dismissals "without prejudice" to dismissals "with prejudice," absent grounds for equitable tolling. *Id.* at 14. This follows the approach taken by the Second Circuit in *Zarvela,* which held under similar circumstances that "[a] pro se litigant should [not] lose his opportunity to present his constitutional challenge to his conviction." *Zarvela,* 254 F.3d at 382-83.

C. This Court Should Remand This Matter For Consideration of Equitable Tolling.

The Court of Appeals noted that "[a]lthough we need not reach the question here, Ford would also be entitled to relief under equitable tolling principles." Pet. App. 35 n.15. Although petitioner asserts "tolling ('equitable' or otherwise) is unwarranted," Pet. Br. 26, as with the stay issue, this issue is not properly before this Court. The lower court did not rule on the question, petitioner did not include equitable tolling in the questions presented in its certiorari petition, *see* Cert. Pet. i, petitioner did not mention the issue in the petition itself, and that "finding," is not an issue on which certiorari was granted. Petitioner has therefore waived any right to argue against equitable tolling in this Court.[15]

[15] Reviewing the issue as the petitioner suggests would produce troublesome results. It would create procedural anomalies, allowing review where the lower court decision disfavors, but denying review where it favors, the petitioner without any clear indication to the respondent that such was the petitioner's intent. *Cf. Stewart*, 523 U.S. 641-42. Review would prove difficult to reconcile with the basic principle that jurisdiction to review is to be narrowly construed. *Utah v. Evans*, 536 U.S. 452, 463 (2002).

A remand for consideration of equitable tolling is appropriate. As set forth in the *amicus curiae* brief of the Federal Public Defender for the Central District of California, AEDPA is plainly subject to equitable tolling, and Ford presents a classic case for application of the rule. If the Court does not affirm the decision below, it should remand to give the Ninth Circuit an opportunity to rule on the issue.

CONCLUSION

For the foregoing reasons, the decision below should be affirmed.

Respectfully submitted,

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(9)

No. 03-221

IN THE SUPREME COURT OF THE UNITED STATES

CHERYL K. PLILER, Warden of California State Prison—Sacramento, *Petitioner,*

v.

RICHARD HERMAN FORD, *Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S REPLY BRIEF ON THE MERITS

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REPLY BRIEF

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) allows a prisoner with unexhausted claims to toll the one-year limitation period during the pendency of state post-conviction or other collateral applications, but not during the pendency of a federal habeas proceeding. *See* 28 U.S.C. § 2244(d)(2); *Duncan v. Walker*, 533 U.S. 167, 178-79 (2001). This case presents the question whether a federal habeas petitioner who purposely disregards AEDPA's tolling provision and files admittedly mixed petitions in federal court should be rewarded by having his otherwise time-barred claims considered on their merits.

I.

ADVISEMENTS DESIGNED TO PROMOTE STAY AND ABEYANCE OF MIXED PETITIONS ARE INCOMPATIBLE WITH *ROSE v. LUNDY* AND AEDPA

A. The Propriety Of Advisements Regarding Stay And Abeyance Must Be Evaluated By Reference To The Procedure Of Stay And Abeyance Itself

Respondent Ford contends that "the validity of the Ninth Circuit's stay procedure is not among the questions presented in the petition for certiorari." Resp't Br. 11. The validity of stay and abeyance, however, is properly before this Court, for it lies clearly within the call of the first question presented in the Warden's certiorari petition. *See* Sup. Ct. R. 14.1(a) (the "statement of any question presented is deemed to comprise every subsidiary question fairly included therein"); *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 512 (1991); *Vance v. Terrazas*, 444 U.S. 252, 258 n.5 (1980) (when "resolution of [a question of law] is an essential, or at least an advisable, predicate to an intelligent resolution" of the question on which certiorari was granted, it can be regarded as "fairly comprised" within it). That question asked whether

the dismissal of a "mixed" petition is improper absent advisements regarding stay and abeyance. The propriety of such advisements, in turn, must be evaluated by reference to what they were designed to promote. Certainly, if stay and abeyance is invalid, then warnings designed to effectuate it need not be given.

And, indeed, they should not be given. In *United States v. Hasting*, 461 U.S. 499, 505-06 (1983), this Court observed that there are three basic purposes served by advisements required of federal district courts: "[T]o implement a remedy for violation of recognized rights; to preserve judicial integrity by ensuring that a conviction rests on appropriate considerations validly before the jury; and finally, as a remedy designed to deter illegal conduct." *Id.* at 505 (citations omitted); *see also Castro v. United States*, 124 S. Ct. 786 (2003); Fed. R. App. P. 47(b). The advisements required by the Ninth Circuit do not implicate any of the purposes recognized by this Court in *Hasting*, but instead promote a procedure that contravenes both *Rose v. Lundy* and AEDPA.

Moreover, the Warden plainly argued against the propriety of stay and abeyance in her petition for writ of certiorari, to which no objection was made in the brief in opposition. As set forth in Rule 15.2 of the Rules of the Supreme Court of the United States, "[a]ny objection to consideration of a question presented based on what occurred in the proceedings below, if the objection does not go to jurisdiction, may be deemed waived unless called to the Court's attention in the brief in opposition." *See* Sup. Ct. R. 15.2. Ford's belated objection to the scope of the questions presented should be deemed waived, as his objection "does not go to jurisdiction." *See id.* ("[T]he brief in opposition should address any perceived misstatement of fact or law in the petition that bears on what issues properly would be before the Court if certiorari were granted").

Despite Ford's assertion that the Ninth Circuit panel merely "left the district court with the *discretion* to [stay the petitions]," Resp't Br. 11 (emphasis in original), the panel made

clear that "the discretion is more a matter of form than substance, and a *denial of the request would likely constitute error*." Pet. App. A26 (emphasis added). In *Kelly v. Small*, 315 F.3d 1063 (CA9 2003), a decision relied upon by the majority in this case, the Ninth Circuit similarly concluded that a district court *abuses* its discretion in *not* staying a petition pending exhaustion of state remedies: "[W]e join the 'growing consensus' in recognizing the clear appropriateness of a stay when valid claims would otherwise be forfeited." *Id.* at 1070; *see also James v. Pliler*, 269 F.3d 1124, 1126-27 (CA9 2001) ("[T]he district court erred in dismissing James' petition without providing him with a meaningful opportunity to amend"). Thus, where a motion to stay has been filed in a case governed by AEDPA, a district court's application of stay and abeyance is little more than a foregone conclusion.

B. *Rose v. Lundy* Requires Dismissal Of Mixed Petitions

1. Ford argues that, under *Rose v. Lundy*, "a prisoner who files a mixed petition is faced with a choice. If he wishes to proceed in federal court on his exhausted claims, then unexhausted claims will be purged from the petition so that he can do so." Resp't Br. 7; *see also id.* at 16; NACDL Amicus Br. 11 ("The State's position [regarding complete dismissal of mixed petitions] is flatly foreclosed by *Rose*"). Not so. In fact, the majority in *Rose* contemplated the deletion of unexhausted claims only *after* the dismissal of a mixed petition: "[W]e hold that a district court must dismiss such 'mixed petitions,' leaving the prisoner with the choice of returning to state court to exhaust his claims or of amending or resubmitting the habeas petition to present only exhausted claims to the district court." 455 U.S. at 510.

Indeed, at the conclusion of its opinion, the majority reiterated that "a district court *must* dismiss habeas petitions containing both unexhausted and exhausted claims." *Rose v. Lundy*, 455 U.S. 509, 522 (1982) (emphasis added). This Court has repeatedly reaffirmed that *Rose v. Lundy* requires the

complete dismissal of petitions containing any unexhausted claims. *See, e.g.*, *Slack v. McDaniel*, 529 U.S. 473, 486-88 (2000) (Kennedy, J.) ("*Rose v. Lundy* dictated that, whatever particular claims the [mixed] petition contained, none could be considered by the federal court"); *Lonchar v. Thomas*, 517 U.S. 314, 324 (1996) (Breyer, J.); *Coleman v. Thompson*, 501 U.S. 722, 731 (1991) (O'Connor, J.); *Castille v. Peoples*, 489 U.S. 346, 349 (1989) (Scalia, J.); *Teague v. Lane*, 489 U.S. 288, 325 (1989) (Stevens, J., concurring) ("In *Rose v. Lundy*, * * * the Court announced that a habeas petition containing exhausted and unexhausted claims must be dismissed"); *Engle v. Isaac*, 456 U.S. 107, 124 n.25 (1982) (O'Connor, J.); *see also Clark v. Tansy*, 13 F.3d 1407, 1409 (CA10 1993) (Under *Rose v. Lundy*, "the district court must dismiss the [mixed] petition, giving the petitioner the choice of re-filing a petition containing solely the exhausted claims * * *, or delaying his habeas petition altogether pending the exhaustion of all his claims"); *Ortberg v. Moody*, 961 F.2d 135, 137 (CA9 199 ("The district court properly dismissed the [mixed] petitio).

Ford appears to conflate the ma ity's holding with the plurality's suggestion that a habe petitioner may avoid outright dismissal of his mixed petition if he "proceed[s] only with his exhausted claims and deliberately sets aside his unexhausted claims * * *." *Rose v. Lundy*, 455 U.S. at 521. The majority, however, did not adopt that suggestion, *see id.* at 510-20, 522, nor has a majority of this Court *ever* held that *Rose v. Lundy* contemplates such a procedure. In fact, Justice O'Connor, who authored the majority and plurality opinions in *Rose v. Lundy*, subsequently reiterated in *Coleman v. Thompson*, 510 U.S. at 731, that "[t]his Court has long held that a state prisoner's federal habeas petition should be dismissed if the prisoner has not exhausted available state remedies as to *any* of his federal claims." (Emphasis added).

2. The stay of mixed petitions is also precluded. In *Slayton v. Smith*, 404 U.S. 53 (1971) (*per curiam*), a case which pre-dates *Rose v. Lundy*, this Court rejected the lower court's

stay of a mixed habeas petition pending exhaustion of state remedies:

> * * * [A]bsent special circumstances, cf. *Nelson v. George*, 399 U.S. 224 (1970), *Wade v. Wilson*, 396 U.S. 282 (1970), rather than ordering retention of the case on the District Court's docket, the Court of Appeals should simply have vacated the judgment of the lower court and directed dismissal of the petition for failure to exhaust state remedies.

Id. at 53-54; *see also id.* (remanding for further proceedings consistent with the opinion).

More recently, in *In re Blodgett*, 502 U.S. 236 (1992) (*per curiam*), this Court chastised the Ninth Circuit over its lengthy stay of a federal habeas proceeding:

> * * * The orders by the Ninth Circuit to vacate submission of the case until completion of the state collateral proceeding and then to hold the case in abeyance pending filing and resolution of the third federal habeas proceeding in the District Court raise the very concerns regarding delay that were part of the rationale for this Court's decision[] in *Rose v. Lundy*.

Id. at 239.[1]

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1. Under stay and abeyance, capital habeas proceedings filed in federal courts in California have been subject to considerable delays pending exhaustion of state-court remedies. In *Reno v. Woodford*, CV 96-2768, currently pending in the Central District of California, the district court issued a stay of the federal habeas proceeding on May 7, 1999, ostensibly to permit the petitioner to file his unexhausted claims in the California Supreme Court. To date, almost five years later, no state-court exhaustion petition has been filed.

C. AEDPA Retains *Rose*'s Exhaustion Requirement

AEDPA incorporates the statutory exhaustion requirement interpreted by *Rose v. Lundy* and its progeny. *See* 28 U.S.C. § 2254(b)(1)(A). This was no accident. Senator Arlen Specter, a proponent of AEDPA, observed during discussions of the bill that "state prosecutors and the attorneys general * * * disagree[d] with [proposals to eliminate the exhaustion requirement from AEDPA]," and noted that the requirement had consequently been retained. 141 Cong. Rec. S7847 (daily ed. June 7, 1995); *see also id.* (statement of Sen. Specter) ("[T]his bill does not abolish [the] exhaustion requirement").

In *Lorillard v. Pons*, 434 U.S. 575 (1978), this Court observed that "where * * * Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute." *Id.* at 581; *see also Williams v. Taylor*, 529 U.S. 420, 434 (2000) (quoting *Lorillard v. Pons*). As such, AEDPA's statutory exhaustion requirement must be interpreted in a way that is "respectful of Congress and of [this] Court's own processes," and with "the same meaning [as applied by *Rose v. Lundy* to AEDPA's statutory predecessor] in the absence of specific direction to the contrary." *Williams v. Taylor*, 529 U.S. at 434.

D. Neither *Rose v. Lundy* Nor AEDPA Contemplates A Stay Of Federal Habeas Proceedings Pending Exhaustion Of Dismissed Claims

1. Even if it were assumed that *Rose v. Lundy* may be interpreted as permitting the deletion of unexhausted claims as an alternative to outright dismissal of a mixed petition, a stay of the purged petition pending exhaustion of the deleted claims would be impermissible. The *Rose* plurality anticipated that purged petitions would be decided expeditiously, in warning that "a prisoner who decides to proceed only with his exhausted claims and deliberately sets aside his unexhausted claims risks

dismissal of subsequent federal petitions" under Rule 9(b) of the Rules Governing Section 2254 Cases. 455 U.S. at 521.

As explained in the Warden's Brief on the Merits, stay and abeyance allows a habeas proceeding to be placed "on hold" indefinitely pending a petitioner's pursuit of state-court remedies. A stay of federal habeas proceedings would thus render Rule 9(b)'s prohibition against second or successive petitions largely irrelevant, by allowing deleted claims to be added back to the stayed petition following exhaustion; such claims would *never* constitute second or successive applications. Ford's interpretation of *Rose v. Lundy* would render the plurality's admonition almost nonsensical. AEDPA codifies Rule 9(b)'s prohibition in § 2244(b)(1), which provides that "[a] claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed." *See Felker v. Turpin*, 518 U.S. 651, 664 (1996) ("The added restrictions which [AEDPA] places on second habeas petitions * * * do not amount to a 'suspension' of the writ contrary to Article I, § 9 ").

2. Ford nevertheless asserts that "district courts have the inherent authority to issue stays in proceedings before them," Resp't Br. 16, and that AEDPA's failure specifically to prohibit stay and abeyance "evinces an intent to permit district courts to stay a mixed petition pending exhaustion." *Id.* at 12. Ford is mistaken on both points. First, as set forth previously, this Court has disapproved of stays of federal habeas petitions. *See Slayton v. Smith*, 404 U.S. at 53-54; *In re Blodgett*, 502 U.S. at 239; *Rose v. Lundy*, 455 U.S. at 521; *see also* 28 U.S.C. § 2244(b)(1).

Second, in drafting AEDPA, Congress presumably was aware of this Court's disapproval. *See Williams v. Taylor*, 529 U.S. at 434. As such, the fact that Congress did not create a "laundry list" of prohibited practices may not be regarded as tacit agreement with a procedure that had been repeatedly rejected by this Court and which, as argued above, would be

inconsistent with AEDPA's statutory design.[2] *Cf. Calderon v. Thompson*, 523 U.S. 538, 554 (1998) ("Although the terms of AEDPA do not govern this case, a court of appeals must exercise its discretion in a manner consistent with the objects of the statute").

3. Contrary to Ford's contention that a stay of a federal habeas petition would not have "the same effect as would tolling [of] AEDPA's statute of limitations," Resp't Br. 18, the only purpose of stay and abeyance is to bypass AEDPA's limitation period by re-incorporating previously-dismissed but newly-exhausted claims. Stay and abeyance is thus functionally indistinguishable from tolling during the pendency of federal habeas proceedings — contrary to this Court's holding in *Duncan v. Walker*, 533 U.S. at 178-79 — and validates the consideration of otherwise time-barred claims. *See Kelly v. Small*, 315 F.3d at 1070. Stated somewhat differently, without tolling, stay and abeyance would serve no useful purpose. Ford appears to acknowledge this by contending "a stay is called for precisely because it would avoid what otherwise would be a statute-of-limitations problem." Resp't Br. 19.

Ford claims, however, that "[t]he premise that stay and abeyance will lead to vexatious litigation is unlikely for the * * * reason that AEDPA was expressly designed to deter

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2. Amicus NACDL argue that this Court has approved of stays of federal actions in favor of parallel state proceedings to enable the federal actions to proceed without the risk of a time bar. NACDL Amicus Br. 16. Yet the decisions relied upon by amicus — *Wilton v. Seven Falls Co.*, 515 U.S. 277 (1995), and *Deakins v. Monaghan*, 484 U.S. 193 (1988) — involved *non-habeas proceedings* (actions for declaratory relief, and for damages and attorney's fees, respectively), where *dismissals* of the federal actions were contemplated upon resolution of the pending state-court actions. Stays of the federal actions were available merely to ensure that the federal actions would go forward in the event "the state case[s], for any reason, fail[ed] to resolve the matter[s] in controversy." *Wilton v. Seven Falls Co.*, 515 U.S. at 288 n.2. And, neither case was subject to exhaustion of state-court remedies as a pre-condition to filing in federal court. The decisions relied upon by amicus NACDL are therefore inapposite.

such abuse." Resp't Br. 21. Ford maintains that "[t]he prisoner who chooses to go into federal court with unexhausted claims runs the risk the district court will simply deny those claims on the merits, thereby subjecting any subsequent petition the petitioner may attempt to file to the extremely rigorous second or successive application requirements contained in § 2244(b)." *Id.* at 22. Ford further argues — without any apparent hint of irony — that "no prisoner with even the most rudimentary understanding of habeas procedure" would do such a thing. *Id. Yet that is precisely what Ford did here.*

Ford filed *admittedly* mixed petitions in the 1997 Weed and Loguercio Cases, and concomitantly moved to stay the proceedings pending exhaustion of state remedies. *See* J.A. 48-49, 56-57, 73-78. Under stay and abeyance, a petitioner like Ford would never be subject to AEDPA's prohibition against the filing of second or successive applications because, as stated previously, he could re-incorporate his dismissed but newly-exhausted claims into the *stayed* petition; in other words, failure to comply with *Rose v. Lundy*'s total exhaustion rule would no longer require the re-filing of dismissed claims by way of a second or successive application. And, as amicus NACDL point out, *see* NACDL Amicus Br. 14, at least two circuit courts of appeals now authorize the stay of mixed petitions *in their entirety*, in clear contravention of *Rose v. Lundy*, as well as AEDPA's successive-filing provision. *See, e.g., Crews v. Horn*, 360 F.3d 146, 154 (CA3 2004); *Freeman v. Page*, 208 F.3d 572, 576 (CA7 2000).

Stay and abeyance renders AEDPA's limitation period, as well as its prohibition against the filing of second or successive applications, "insignificant, if not wholly superfluous." *Duncan v. Walker*, 533 U.S. at 174. As this Court stated in construing AEDPA's state collateral-application tolling provision, "We are * * * 'reluctan[t] to treat statutory terms as surplusage' in any setting." *Id.* (citations omitted). The Ninth Circuit's interpretation of AEDPA, in contrast, ignores this Court's admonition and "guts" pivotally-important statutory provisions.

E. AEDPA's One-Year Limitation Period, Coupled With *Rose*'s Exhaustion Rule, Does Not Unreasonably Impair A Petitioner's Right To Seek Relief

AEDPA imposes a one-year limitation period upon the filing of federal habeas petitions following the finality of a state criminal conviction. *See* 28 U.S.C. § 2244(d)(1); *see also* 141 Cong. Rec. S4590 (daily ed. Mar. 24, 1995) (statement of Sen. Specter) (referring to "basic building blocks of habeas corpus reform," including the establishment of "time limits on filing habeas corpus petitions"); *Lonchar v. Thomas*, 517 U.S. at 333-34 (documenting bills proposing "a statute of limitations for federal habeas corpus petitions" over a ten-year period).

The Ninth Circuit has concluded that, absent statutory tolling, AEDPA's one-year limitation period commences with the California Supreme Court's denial of review (or decision on the merits), plus ninety days, which takes into account the time within which a petition for writ of certiorari may be filed. *See Bowen v. Roe*, 188 F.3d 1157, 1159-60 (CA9 1999); *see also Caspari v. Bohlen*, 510 U.S. 383, 390 (1994). As Senator Specter noted:

> [AEDPA's] abbreviated timetable does not take effect until State court review of a sentence • • • is completed. No time limit is placed by this legislation on the length of trial or on periods for consideration of post-trial motions and the State court appeals. During that period, most, if not all, of the complex factual and legal issues will be organized, analyzed and resolved by the State courts, so that these issues will not be novel when the case goes to Federal court.

141 Cong. Rec. S4590 (daily ed. Mar. 24, 1995).

Ford nevertheless contends that AEDPA's limitation period, coupled with *Rose v. Lundy*'s total exhaustion rule, improperly deprived him of the ability to have any re-filed claims addressed, purportedly because the district court's

"'dismissal without prejudice' [was] substantively transformed into a 'dismissal with prejudice'" as a result of the presumptive expiration of AEDPA's limitation period. Resp't Br. 14. Yet as the dissent below astutely observed:

> Dismissal without prejudice was not the equivalent of a dismissal with prejudice. Ford was perfectly free to re-file. If thereafter, the statute of limitations had been raised as an affirmative defense, Ford then would have been entitled to assert whatever factual, statutory, and equitable defenses to the statute of limitations he might have had. And if the statute of limitations had not been raised, it would have been waived.

Pet. App. A42 (Silverman, J., dissenting).

Indeed, *Rose v. Lundy* appears to suggest that a total exhaustion rule will not "unreasonably impair the [petitioner's] right to relief," 455 U.S. at 522, as long as the petitioner is allowed to *re-file* his claims following the dismissal of a mixed petition; *Rose* does not require that re-filed claims be considered on the *merits*. Even before the enactment of AEDPA, re-filed claims could be summarily denied in federal court where, for example, the claims had been procedurally defaulted in state court on "independent and adequate" state-law grounds. *See, e.g., Coleman v. Thompson*, 501 U.S. at 731-32; *Castille v. Peoples*, 489 U.S. at 351-52; *Wainwright v. Sykes*, 433 U.S. 72, 81, 87 (1977); *see also Rose v. Lundy*, 455 U.S. at 521 (plurality opn.) ("[A] prisoner who decides to proceed only with his exhausted claims and deliberately sets aside his unexhausted claims risks dismissal of subsequent federal petitions"); *cf. McCleskey v. Zant*, 499 U.S. 467, 494 (1991) (allowing relief from procedural default based upon a showing of cause and prejudice); 28 U.S.C. § 2244(b)(2).

The possibility that a claim *might* be time-barred under AEDPA upon re-filing in a particular case does not, by itself,

constitute an "unreasonabl[e] impair[ment]" of a petitioner's right to relief. AEDPA does not impose a "blanket" restriction on a petitioner's ability to have his claim heard on the merits; instead, AEDPA recognizes that timeliness involves a "fact-intensive" inquiry," Pet. App. A43 (Silverman, J., dissenting), which requires a case-by-case analysis of the applicability of statutory defenses to the limitation period.[3] *See* 28 U.S.C. § 2244(d)(1). That inquiry will inevitably lead to determinations allowing claims that at first blush appeared to be time-barred.

Ford in essence argues that AEDPA's limitation period in itself constitutes an unreasonable impairment. Yet as this Court observed in *Felker v. Turpin*, 518 U.S. at 664, "[W]e have long recognized that 'the power to award the writ by any of the courts of the United States, must be given by written law,' * * * and we have likewise recognized that judgments about the proper scope of the writ are 'normally for Congress to make.'" *Cf. Slack v. McDaniel*, 529 U.S. at 486-88 (*re-filing* of second habeas petition permitted where prior, mixed habeas petition was dismissed under *Rose v. Lundy*, because prior petition treated "as though it had not been filed"); *Stewart v. Martinez-Villareal*, 523 U.S. 637, 643-44 (1998) (competence-to-be-executed claim that was dismissed as "premature" was not barred from *re-filing* as second or successive petition when "ripe").

F. *Rose v. Lundy* Does Not Require District Courts To Provide Advisements Prior To Dismissal Of Mixed Petitions

1. Ford contends the Ninth Circuit's advisement requirement regarding the stay of mixed petitions was appropriate, purportedly because it "simply implement[s] what

3. Ford's assertion that "'a dismissal of a first habeas petition * * * would bar the prisoner from ever obtaining federal habeas review,'" Resp't Br. 24 is therefore incorrect.

this Court *already* requires." Resp't Br. 27 (emphasis in original); *see also* NACDL Amicus Br. 28. According to Ford, *Rose v. Lundy* itself mandates that "a prisoner be given '*the choice* of returning to state court to exhaust his claims or amending or resubmitting the habeas petition to present only exhausted claims to the district court.'" *Id.* (emphasis in original).

What *Rose v. Lundy* actually provides, however, is that "a district court must dismiss * * * 'mixed petitions,' *leaving* the prisoner with the choice" referred to above. 455 U.S. at 510 (emphasis added). Nowhere in *Rose* is there any mention of advisements; instead, *Rose* and its progeny contemplate the summary dismissal of mixed petitions. Thus, despite Ford's complaint that the Warden's interpretation "[f]orc[es] pro se prisoner litigants to make a choice, without any corresponding information relative to that choice," Resp't Br. 28, this Court has approved of such a procedure for over twenty years.[4]

2. The Ninth Circuit's requirement of a limitation-period advisement is similarly unmeritorious. According to Ford, the panel "merely requires the district judge to notify a pro se plaintiff of the existence of the AEDPA limitation and the fact part or all of the period, whichever is the case, has already run, a relatively simple task." Resp't Br. 32-33. Yet as the dissent below noted:

> * * * This argument fails to take account of the fact that the district judge will almost never be able to tell, solely from the face of the petition, that the statute of limitations has expired. The calculation of the limitations deadline requires the examination of

4. Thus, the dismissal of mixed petitions does not amount to the unilateral re-characterization of a pleading, but instead constitutes the application of well-settled law. *Compare Castro v. United States*, 124 S. Ct. at 786.

> documents that rarely, if ever, accompany the petition. * * *

Pet. App. A42 (Silverman, J., dissenting).

Amicus NACDL suggests that "[a]nswering the statute of limitations question should require little additional work," purportedly because the district court is "already charged with determining whether each claim presented has been fully exhausted, a complicated question that requires review of the entire record of proceedings." NACDL Amicus Br. 22. Amicus misperceives the nature of exhaustion determinations in § 2254 cases. At the time motions to dismiss for failure to exhaust state-court remedies are considered, district courts generally do *not* have before them the entire record of proceedings, because consideration of that record is unnecessary to the determination of exhaustion. Instead, district courts compare allegations presented in documents filed in the state supreme court (i.e., petitions for review and/or petitions for writs of habeas corpus) against allegations set forth in the pending federal habeas petitions; lower court petitions that may have been filed will not be considered in that comparison (although they may affect tolling). *See Carey v. Saffold*, 536 U.S. 214, 221 (2002) ("California's collateral review system differs from that of other States in that it does not require, technically speaking, appellate review of a lower court determination"). The "entire record of proceedings" is lodged where a determination on the merits is warranted. Moreover, where exhaustion is at issue, timeliness typically is not. In fact, the record of proceedings was not lodged with the district court in this matter.

In *Diaz v. Sec'y for Dep't of Corr.*, No. 02-10114, 2004 U.S. App. LEXIS 4587 (CA11 Mar. 10, 2004), the Eleventh Circuit recently declined to apply the limitation-period advisement required by the Ninth Circuit in this case. The court recognized the "considerable burden" that would be placed on district courts if "they were required to assume the role of advocate for the *pro se*, parse the often hard-to-decipher

pleadings, and advise the *pro se* of all the potential risks of the requested action." *Id.* at *11 n.7; *see also Castro v. United States*, 124 S. Ct. at 795 (Scalia, J., concurring) ("[E]ven fully informed district courts that try their best not to harm *pro se* litigants by recharacterizing may nonetheless end up doing so because they cannot predict and protect against every possible adverse effect that may flow from recharacterization").

II.

"RELATION BACK," AS SET FORTH IN RULE 15(c) OF THE FEDERAL RULES OF CIVIL PROCEDURE, WOULD CONTRAVENE AEDPA IN HABEAS CASES

A. Rule 15(c) Is Not Applicable To Habeas Proceedings

1. Rule 11 of the Rules Governing Section 2254 Cases provides that "[t]he Federal Rules of Civil Procedure, to the extent that they are not inconsistent with these rules, may be applied, when appropriate, to petitions filed under these rules." Rule 11, foll. 28 U.S.C. § 2254. The Advisory Committee Notes to Rule 11 warn, however, that courts should not "rigidly apply [Federal Rules of Civil Procedure] which would be inconsistent or inequitable in the overall framework of habeas corpus."

Application of Rule 15(c), which permits relation back of amendments, would be inconsistent with the "overall framework" of AEDPA because, as set forth previously, AEDPA contemplates the dismissal of mixed habeas petitions under *Rose v. Lundy*. Where a mixed petition is dismissed in its entirety, *there is nothing to which any newly-exhausted claims can relate back. See Slack v. McDaniel*, 529 U.S. at 487-88 (holding an initial mixed petition that was dismissed should be treated "as though it had not been filed").

2. Even if it were assumed that unexhausted claims may be deleted from a mixed petition in lieu of complete dismissal, relation back would be inconsistent with AEDPA. Under relation back, where a habeas petitioner files a timely but mixed

federal petition containing just *one* exhausted claim, the unexhausted (and subsequently dismissed) claims alleged in the petition would also be considered timely (even if their pursuit in state court was *not*). The filing of a *federal* habeas petition would, for all intents and purposes, toll the limitation period. *Compare Duncan v. Walker*, 533 U.S. at 180. Relation back would eviscerate AEDPA's limitation period and reduce its state collateral-application tolling provision to mere surplusage. Indeed, Ford *himself* recognizes that AEDPA was designed "to promote the 'exhaustion of available *state* remedies — which is the object of § 2244(d)(2).'" Resp't Br. 39 (emphasis added).

3. Ford nevertheless contends that Rule 15(c) is applicable to AEDPA because, under 28 U.S.C. § 2242, habeas petitions "'may be amended or supplemented as provided in the rules of procedure applicable to civil actions.'" Resp't Br. 37; *see also* NACDL Amicus Br. 18. Section 2242 may not be read so broadly. In *Banks v. Dretke*, 124 S. Ct. 1256 (2004), this Court recently considered the applicability of Rule 15(b) (amendments to conform to the evidence) to federal habeas proceedings. Although this Court concluded that "[u]nder pre-AEDPA law, there was no inconsistency between Rule 15(b) and * * * defenses [based upon exhaustion and procedural default]" because those defenses "could be waived based on the State's litigation conduct," it noted that "AEDPA forbids a finding that exhaustion has been waived unless the State expressly waives the requirement * * * ." *Id.* at 1280. Thus, under *Banks v. Dretke*, it is arguable whether even Rule 15(b) would apply to AEDPA, because the amendment of a pleading to conform to newly-presented and unexhausted evidence could not be accomplished absent an express waiver of exhaustion. 28 U.S.C. § 2254(b)(3); *see also Mitchell v. Esparza*, 124 S. Ct. 7, 12 n.3 (2003) (*per curiam*) (unexhausted evidence introduced in federal habeas proceeding "ha[d] no bearing on the correctness of the [state court's] decision * * * *").

4. Even if it were assumed that federal habeas petitions may be *amended* to re-incorporate previously-dismissed claims,

however, relation back would not apply. As one court noted in discussing the interplay between amendment and relation back, "federal law treats amendment and relation back as raising separate issues." *Pessotti v. Eagle Mfg. Co.*, 946 F.2d 974, 977-81 (CA1 1991) (finding relation back properly denied even though amendment was granted, in part because plaintiff could have discovered the facts alleged in the amendment prior to the time the initial complaint was filed).

5. Finally, Rule 15(c) by its very terms applies only to "[a]n amendment of a *pleading*." (Emphasis added). Because Ford's second set of federal habeas petitions did not constitute "amendment[s]" of the first, but were instead separate and distinct proceedings, relation back would not be appropriate in this case under *any* circumstances. *See Neverson v. Bissonnette*, 261 F.3d 120, 126 (CA1 2001); *see also Newell v. Hanks*, 283 F.3d 827, 834 (CA7 2002); *Marsh v. Soares*, 223 F.3d 1217, 1219-20 (CA10 2000); *Warren v. Garvin*, 219 F.3d 111, 113 (CA2 2000); *Nyland v. Moore*, 216 F.3d 1264, 1266 (CA11 2000); *Jones v. Morton*, 195 F.3d 153, 160-61 (CA3 1999).

III.

REMAND FOR RECONSIDERATION OF EQUITABLE TOLLING IS UNWARRANTED

A. The Ninth Circuit Did Not Rely Upon Equitable Tolling To Reach Its Holding

Ford and amicus NACDL both urge this Court to remand this matter for consideration of "equitable" tolling of AEDPA's limitation period. *See* Resp't Br. 45-46; NACDL Amicus Br. 29-30; *see also* Mot. for Leave to File Br. and Br. of Federal Defenders in the Ninth Circuit, *passim*. Yet the majority below expressly noted that it did not "reach [that] question here," and reiterated, "[B]ecause we grant Ford relief on statutory grounds, we do not resolve any equitable tolling claim here." Pet. App. A35 n.15. Indeed, as the dissent observed, equitable tolling was not raised in the district court, or "even after [the panel] invited

supplemental briefing." *Id.* at A45. In fact, Ford did not raise this issue in his brief in opposition to the Warden's petition for writ of certiorari. Remand for reconsideration of that issue would be unnecessary and inappropriate.[5]

B. Reversal Would Render The Panel's Dicta Regarding Equitable Tolling Moot

The Ninth Circuit remarked that, had the issue of equitable tolling been before it, it would have concluded that the district court's failure "properly and fully to inform Ford about his options with respect to the mixed petitions and in misleading him as to the legal effect of a dismissal of his petitions [would constitute] 'extraordinary circumstances' beyond Ford's control that would require equitable tolling of AEDPA's statute of limitations." Pet. App. A35 n.15.

Should this Court determine, however, that reversal is warranted either because no advisements were necessary or because the advisements given were adequate, the basis of the majority's conclusion would be rendered moot. Under those circumstances, "remand to give the Ninth Circuit an opportunity to rule on the issue [of equitable tolling]," Resp't Br. 46, would amount to a meaningless gesture.

C. Equitable Tolling May Not Be Applied To The AEDPA Limitation Period

The panel's conclusion that equitable tolling applies to AEDPA is inconsistent with this Court's rationale in other cases. In *United States v. Beggerly*, 524 U.S. 38 (1998), this Court held that equitable tolling was not available as to the Quiet Title Act, 28 U.S.C. § 2409a, because Congress had already accounted for equitable tolling by "providing that the statute of limitations will not begin to run until the plaintiff

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5. The applicability of equitable tolling to AEDPA is squarely presented by the petition for writ of certiorari filed in *Adams v. Brambles* (No. 03-357), currently pending in this Court.

'knew or should have known of the claim of the United States,'" and, that under those circumstances, "[e]quitable tolling is not permissible where it is inconsistent with the text of the relevant statute." *Id.* at 48.

Similarly, this Court in *Lampf v. Gilbertson*, 501 U.S. 350 (1991), held that Congress did not intend the statute of limitation of 15 U.S.C. § 78j(b), pertaining to the Securities and Exchange Commission, to be equitably tolled. *Id.* at 363. This Court reasoned, in part, that "[t]he 1-year period, by its terms, begins after discovery of the facts constituting the violation, mak[ing] tolling unnecessary." *Id.*; *see also United States v. Brockamp*, 519 U.S. 347, 351-52 (1997); *cf. Lonchar v. Thomas*, 517 U.S. at 316 ("[T]his Rule, not some general 'equitable' power to create exceptions to the Rule, should have determined whether or not the petition's dismissal was appropriate").

Like the statutes at issue in *Beggerly* and *Lampf*, AEDPA already contains a provision in § 2244(d)(1)(D), "which postpones the running of the one-year limitation for the filing of a petition for habeas corpus to 'the [earliest] date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.'" *Taliani v. Chrans*, 189 F.3d 597, 598 (CA7 1999). Furthermore, Congress detailed two other equitable conditions for enlarging the period and also specified prerequisites for statutory tolling. See 28 U.S.C. § 2244(d)(1)(B), (C), (2). As the First Circuit recently explained in questioning the applicability of equitable tolling under AEDPA, "AEDPA reflects Congress' view that the courts were being too generous with habeas relief and that the whole system needed to be tightened up." *David v. Hall*, 318 F.3d 343, 346 (CA1 2003); *see also Taliani v. Chrans*, 189 F.3d at 598 ("Given this and other express tolling provisions (28 U.S.C. §§ 2244(d)(1)(B), (C), (2)), it is unclear what room remains for importing the judge-made doctrine of equitable tolling").

Accordingly, extension of AEDPA's one-year limitation period by equitable tolling would be "unwarranted," *see United States v. Beggerly*, 524 U.S. at 49, and "unnecessary," *see Lampf v. Gilbertson*, 501 U.S. at 363.

CONCLUSION

For these reasons and those stated in the Warden's opening brief, the judgment of the court of appeals should be reversed.

Dated: April 14, 2004

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IN THE

Supreme Court of the United States

CHERYL K. PLILER,
Petitioner,
v.
RICHARD HERMAN FORD,
Respondant.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

1. Whether the dismissal of a "mixed" habeas petition is improper unless the district court informs the petitioner about the possibility of a stay of the proceeding pending exhaustion of state remedies and advises the petitioner with respect to the statute of limitations in the event of any refiling.

2. Whether a second, untimely habeas petition may relate back to a first habeas petition, where the first habeas petition was dismissed and the first proceeding is no longer pending.

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INTEREST OF *AMICUS CURIAE*[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a non-profit organization with direct national membership of over 10,000 attorneys, in addition to more than 28,000 affiliate members from all 50 states. Founded in 1958, NACDL is the only professional bar association that represents public and private criminal defense lawyers at the national level. The American Bar Association recognizes NACDL as an affiliated organization with full representation in the ABA House of Delegates.

NACDL's mission is to ensure justice and due process for the accused; to foster the integrity, independence, and expertise of the criminal defense profession; and to promote the proper and fair administration of criminal justice, including issues involving federal habeas corpus. NACDL has filed *amicus curiae* briefs in this Court in many cases involving federal habeas corpus, including cases raising issues similar to the one presented here. *See Slack v. McDaniel*, 529 U.S. 473 (2000); *Stewart v. Martinez-Villareal*, 523 U.S. 637 (1998).

STATEMENT OF THE CASE

In *Rose v. Lundy*, 455 U.S. 509 (1982), this Court held that a "mixed" habeas petition – a petition raising both exhausted and unexhausted claims – should in most cases be dismissed "without prejudice," allowing the prisoner to exhaust state remedies and then return to federal court with a perfected petition. Fifteen years later, Congress enacted the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), which includes a one-year statute of limitations for the filing of federal habeas petitions. 28 U.S.C. § 2244(d)(1)(A). This case arises at the intersection of those

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[1] This brief is filed with the written consent of both parties. No party or counsel for a party to this case authored this brief in whole or in part, and no person or entity other than *amicus curiae*, its members, or its counsel has made a monetary contribution to the preparation or submission of this brief.

two rules, when the procedures endorsed by *Rose* for a return to federal court are threatened by the AEDPA limitations period. At issue are the efforts of the federal courts to preserve *Rose* and cases like it, and to ensure that application of *Rose* procedures under AEDPA does not have the unintended effect of forever foreclosing federal court review.

1. In 1988, respondent Richard Herman Ford ("Ford") was convicted in two separate state-court proceedings of first-degree murder and conspiracy to commit murder (the "Weed" case) and conspiracy to commit murder and attempted murder (the "Loguercio" case). Pet. App. 16, 18.[2] Ford was sentenced to life without the possibility of parole. Both convictions became final in 1993. *Id.* at 16, 19.[3]

2. On April 24, 1996, AEDPA became effective. Under AEDPA's one-year statute of limitations (as applied to convictions final before its passage) Ford was required to file any federal habeas petitions within one year of AEDPA's effective date, or by April 24, 1997. *See id.* at 21. On April 19, 1997, within AEDPA's one-year period, Ford submitted timely *pro se* federal petitions challenging his convictions in both the Weed and Loguercio cases (the "first petitions"). *Id.* at 16, 19. The filing of those petitions did not toll the AEDPA statute of limitations, which continued to run. *See Duncan v. Walker*, 533 U.S. 167 (2001).

3. By the time the magistrate judge issued reports on the petitions in August and September of 1997, the AEDPA statute of limitations had expired. Pet. App. 17, 20. The magistrate judge found that some, though not all, of Ford's claims in each of the cases were unexhausted, and gave Ford two options for proceeding. First, Ford could dismiss his unexhausted claims and proceed in federal court on his exhausted

[2] The appendix to the petition for certiorari is abbreviated as "Pet. App." All citations are to section A of the appendix.

[3] For a full description of the state court proceedings, *see* Respondent's Brief.

claims only. If Ford so chose, however, the magistrate judge indicated that it would "*not* later rule" on the claims yet to be exhausted, and would require Ford to file a statement "forever waiv[ing] his right to assert" the unexhausted claims "in the present habeas petition." J.A. 52 (emphasis in original).

Alternatively, the court would dismiss the entire mixed petition "without prejudice," so that Ford could return to state court to exhaust all of his claims. Pet. App. 17, 19. At this point, Ford expressed concerns about AEDPA's statute of limitations. J.A. 53. But the magistrate judge did not inform Ford that the AEDPA time period had run already and that as a result, absent grounds for equitable tolling, a dismissal "without prejudice" would leave Ford unable to bring any of his claims before a federal court. Pet. App. 14. Instead, the magistrate judge assured Ford that, as to the unexhausted claims, AEDPA's limitation period "begins to run only when the factual predicate of the claims could have been discovered through the exercise of due diligence." J.A. 53.

Under the magistrate judge's order, Ford was required to notify the court if and only if he wished to dismiss his unexhausted claims and proceed on the exhausted ones. The default presumption was thus that the court would dismiss the entire petition without prejudice.[4] After Ford did not timely respond, the magistrate judge recommended that both petitions be dismissed without prejudice. Pet. App. 17, 20.

Ford also filed, with both petitions, motions to stay the proceedings if it were determined that any of his claims were unexhausted, so that he could exhaust state remedies and then resume his federal action. *Id.* at 14. Under Ninth Circuit precedent, however, the magistrate judge could not stay mixed petitions; Ford would have to withdraw his unexhausted claims first. *Id.* at 17, 19. The magistrate judge did

[4] Any suggestion that Ford somehow failed to comply with the magistrate judge's instructions, *see* Petitioner's Brief ("Pet. Br.") at 5, is inaccurate. Here and throughout the habeas proceedings, respondent promptly and diligently followed court instructions in pursuing relief.

not inform Ford of that requirement, and the unexhausted claims thus remained in the petitions. *Id.* at 14. The magistrate judge recommended that Ford's stay motions be denied. *Id.* at 17, 19.

The district court adopted all of the magistrate judge's recommendations. The Loguercio petition was dismissed without prejudice on September 11, 1997, and the Weed petition on October 14, 1997. *Id.* at 17, 20.

4. After the dismissals, Ford acted quickly to exhaust all remaining claims. On September 29, 1997, 18 days after dismissal, Ford filed a state petition with the California Supreme Court seeking relief in the Loguercio case. *Id.* at 17. On October 24, ten days after dismissal of the Weed petition, Ford submitted his state habeas petition in that case. *Id.* at 20. On March 25, 1998, the California Supreme Court summarily denied both petitions. *Id.* at 18, 20.

5. Ford attempted to return to federal court exactly one week later, submitting petitions in both cases on April 1, 1998 (the "second petitions"). The state moved for dismissal on the ground that the second petitions were filed after AEDPA's April 24, 1997 cut-off date. Ford argued that he had diligently litigated his state petitions and second federal petitions, in reliance on the understanding that the initial dismissals "without prejudice" would allow him to return to federal court after exhausting his claims. Ct. App. Appellant's Rec. 540. The magistrate judge recommended dismissal of the second petitions as time-barred under AEDPA, and the district court agreed. Pet. App. 18, 21. As a result, neither the magistrate judge nor the district court ever examined the merits of Ford's petitions, including the nine concededly timely-filed and exhausted claims set forth in the initial Loguercio petition, J.A. at 43-53, and the five concededly timely-filed and exhausted claims set forth in the initial Weed petition, *id.* at 75-83.

6. In the decision below, the Ninth Circuit reversed. The court held, first, that the dismissals of Ford's initial petitions had been improper. Ford's decision "to have his timely-filed . . . petitions dismissed without prejudice was an uniformed one," the court found, because the magistrate judge had informed Ford neither of his option to withdraw his unexhausted claims and seek a stay nor of the time bar that he would face if the petitions were dismissed in their entirety. Pet. App. 15 And because the original dismissals were improper, the second petitions, insofar as they reasserted claims in the initial petitions, would "relate back" to the filing date of the initial petitions. *Id.* at 31.[5]

SUMMARY OF ARGUMENT

There is no indication that Congress, in enacting AEDPA, intended to foreclose federal review of the constitutional claims of prisoners who file timely but mixed petitions. Such an outcome would run contrary to this Court's own decisions, which protect the right of prisoners who file mixed petitions to return to federal court after presenting their claims to the state courts. It also would work a real injustice against *pro se* prisoners who file petitions that are timely under AEDPA, only to find that even a good-faith failure to exhaust one or more claims operates as an absolute bar to federal review of *any* of their claims.

Federal courts around the country have responded with stay procedures that allow them to hold federal proceedings in abeyance pending exhaustion, and to permit amendment with subsequently exhausted claims under Rule 15(c)'s "relation back" doctrine. Contrary to petitioner's broad-based attack, those stay procedures fall well within a district court's authority, and are entirely consistent with the dictates of AEDPA and this Court's decisions. They are a workable solution, leaving district courts with ample discretion to pre-

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[5] Claims raised only in the second petitions were treated differently. The court remanded five claims newly asserted in the second Weed petition for consideration of equitable tolling, and affirmed the dismissal of two claims newly raised in the second Loguercio petition. Pet. App. 35-39. Those claims are not at issue before this Court.

vent dilatory or abusive litigation tactics. And in a post-AEDPA world, they are the only sensible way to effectuate this Court's consistent holdings that a mixed petition does not foreclose post-exhaustion federal review.

ARGUMENT

I. A STAY PENDING EXHAUSTION EFFECTUATES THE ESTABLISHED RULE THAT THE FILING OF A MIXED PETITION DOES NOT FORECLOSE FEDERAL REVIEW.

A. This Court's Decisions Protect The Right Of A Prisoner Who Files A Mixed Petition To Return To Federal Court After Fully Exhausting His Claims.

1. The requirement that prisoners exhaust state remedies before federal habeas relief may be granted is not jurisdictional. *Granberry v. Greer*, 481 U.S. 129, 131 (1987); *Strickland v. Washington*, 466 U.S. 668, 679 (1984). Rather, though it furthers important comity interests, the exhaustion doctrine creates only a "technical procedural" requirement. *Martinez-Villareal*, 523 U.S. at 645. As a result, this Court has consistently held that the failure to properly exhaust state remedies cannot "bar the prisoner from ever obtaining federal habeas review," *id.*, or "bar the prisoner from raising non-frivolous claims" that "a federal court [has] yet to review." *Slack*, 529 U.S. at 487. The exhaustion rule is not designed to "'trap the unwary *pro se* prisoner.'" *Rose*, 455 U.S. at 520 (citation omitted).

2. In a line of cases beginning with *Rose*, the Court has applied that principle to mixed petitions. In every one of those cases, the Court has held that a prisoner's initial failure to comply fully with the exhaustion requirement does *not* deprive him of an opportunity for federal review. On the contrary, the Court has insisted on procedures that protect the right of a prisoner to return to federal court after fully exhausting state remedies.

At issue in *Rose* was whether a federal court faced with a mixed petition could consider all of the claims, including those that were unexhausted. 455 U.S. at 519. The Court held that principles of comity forbid a federal district court from deciding claims that have not been presented to the state courts. *Id.* at 515, 519. At the same time, the Court carefully left open two alternate routes to federal court review. First, a prisoner seeking "speedy federal relief" could "delete the unexhausted claims" and proceed immediately in federal court on a now fully-exhausted petition, *id.* at 520 – but run the risk that a second federal petition raising newly exhausted claims might be dismissed under the "abuse of the writ" doctrine, *id.* at 521 (plurality opinion). Alternatively, a prisoner could ensure that all of his claims eventually would be heard in federal court by forgoing immediate review and opting instead for "total exhaustion." *Id.* at 522. To effectuate that choice, district courts were instructed to dismiss the entire mixed petition so that the prisoner could fully exhaust his state remedies *before returning to federal court* with one, now-perfected, petition. *Id.* at 514, 520. As this Court recently explained, dismissal under *Rose* always "contemplated that the prisoner could return to federal court after the requisite exhaustion." *Slack*, 529 U.S. at 486.

That right of return was safeguarded again in *Martinez-Villareal*. The question there was whether a federal habeas claim dismissed as "premature" and then reasserted when ripe could be barred as "successive" under AEDPA. 523 U.S. at 643. The Court held that there was no bar: "[O]nce the federal claim has been fairly presented to the state courts, the exhaustion requirement is satisfied," and a habeas petitioner may return to federal court. *Id.* at 644. "To hold otherwise," the Court concluded, "would mean that a dismissal of a first habeas petition for technical procedural reasons would bar the prisoner from ever obtaining federal habeas review." *Id.* at 645.

In *Slack*, the Court confirmed that dismissal of an initial mixed petition does not preclude federal review once all claims are exhausted. Rejecting the state's argument that any subsequent federal petition could be barred as "successive," the Court reaffirmed that prisoners who file mixed petitions may fully exhaust state remedies and then return to federal court for a hearing. 529 U.S. at 486-87 (under *Rose*, subsequent federal review may be precluded "only if a prisoner decline[s] to return to state court and decide[s] to proceed with his exhausted claims in federal court"). And under the "total exhaustion" option, claims not pressed in an initial petition may nevertheless be raised in a subsequent federal petition after the exhaustion anticipated by *Rose*. *Id.* at 487.

In sum, this Court has consistently construed governing habeas law to protect the right of a prisoner who files a mixed petition to return to federal court once he has fully exhausted state remedies. As the Court concluded in *Slack*, any other rule "would be contrary to our admonition that the complete exhaustion rule is not to 'trap the unwary *pro se* petitioner.'" *Id.* (quoting *Rose*, 455 U.S. at 520).

B. A Stay Is Necessary To Effectuate The Right To Return To Federal Court.

1. A procedure for staying federal proceedings on mixed petitions became necessary after AEDPA was enacted in 1996. When this Court adopted the "total exhaustion" rule in *Rose*, there was no statute of limitations for the filing of federal habeas petitions, and a prisoner seeking to file a second federal petition after fully exhausting state remedies faced no time bar. But AEDPA added to the mix a one-year statute of limitations, which in many cases would convert the procedures endorsed in *Rose* into a complete bar on federal review.

This case is a perfect example. There is no dispute but that Ford's first habeas petitions were timely filed under AEDPA. But the magistrate judge did not alert Ford, who was proceeding *pro se*, that his petitions included unexhausted claims until *after* the AEDPA limitations period had

expired. When Ford effectively opted for "complete exhaustion" under *Rose*, the district court dismissed his petitions without prejudice to post-exhaustion refiling. But by then, on petitioner's view, it was too late; the limitations period had run already, and despite the fact that Ford's initial petitions were timely filed and included exhausted claims, federal review of *all* of his claims was foreclosed.

There is nothing unique about Ford's case. As Justice Breyer explained in *Duncan v. Walker*, 533 U.S. 167, 186 (2001) (Breyer, J., dissenting), 57 percent of federal habeas petitions are dismissed for failure to completely exhaust state remedies. And on average, district courts take 268 days to dismiss petitions on procedural grounds. *Id.* That means that a prisoner who files a petition well *within* the AEDPA limitations period often will have his petition dismissed as mixed only *after* the period has expired – when, on the state's view, it will be impossible for him to file a subsequent perfected petition in federal court. Moreover, that outcome may have nothing to do with a prisoner's diligence and everything to do with which district court hears his case. "If Prisoner A and Prisoner B file mixed petitions in different district courts six months before the . . . limitations period expires, and the court takes three months to dismiss Prisoner A's petition, but seven months to dismiss Prisoner B's petition, Prisoner A will be able to return to federal court after exhausting state remedies, but prisoner B – due to no fault of his own – may not." *Id.*

2. It is not enough to say, as petitioner does, that a prisoner can avoid the problem simply by filing a fully exhausted petition the first time around. Pet. Br. 18-19. *Rose* and *Slack* protect the right of prisoners to federal review even after filing *mixed* petitions. And they do so because, as this Court has recognized, the exhaustion rule, though straightforward in the abstract, is very difficult to navigate in practice – especially for prisoners proceeding *pro se*.

Even the most diligent prisoner, for instance, may have difficulty identifying precisely which state remedies must be exhausted. *See O'Sullivan v. Boerckel*, 526 U.S. 838, 844 (1999) (applying exhaustion doctrine to requests for discretionary review). He may draft inartfully, so that a constitutional claim is not pressed with adequate specificity. *Compare Baldwin v. Reese*, 124 S. Ct. 1347, 1348 (2004) (prisoner failed to meet the "fair presentation" standard), *with id.* at 1352 (Stevens, J., dissenting) (state courts had "fair opportunity to assess respondent's federal claim"). Or he may file a state post-conviction petition that is procedurally deficient in some way – and thus lose the benefit of AEDPA's tolling provision for "properly filed" state pleadings. *See* 28 U.S.C. § 2244(d)(2).

The problem created by the interplay between *Rose*'s "total exhaustion" procedures and the AEDPA limitations period cannot be wished away by imagining a world in which good-faith litigants never file mixed petitions. Petitioner's position necessarily entails that some significant number of prisoners, acting with all due diligence, will file timely petitions including exhausted claims that can never be reviewed in federal court. The "total exhaustion" rule was never meant to operate as that kind of a "trap" for the "unwary *pro se* petitioner." *Slack*, 529 U.S. at 487 (quoting *Rose*, 455 U.S. at 520).

II. THE STAY PROCEDURES CHALLENGED BY PETITIONER ARE WELL WITHIN A DISTRICT COURT'S DISCRETIONARY AUTHORITY.

Fortunately, nothing in AEDPA or this Court's cases requires such a draconian result. As Justice Stevens explained in his concurring opinion in *Duncan*: "[A]lthough the Court's pre-AEDPA decision in [*Rose v. Lundy*] prescribed the dismissal of federal habeas corpus petitions containing unexhausted claims, in our post-AEDPA world there is no reason why a district court should not retain jurisdiction over a meritorious claim and stay further proceedings pending the

complete exhaustion of state remedies." 533 U.S. at 182-83. That solution has now been adopted by many of the federal circuit courts, and has proven workable. *See infra* at 21-23. And petitioner's scattershot arguments notwithstanding, such stays are entirely consistent with AEDPA and this Court's decisions.

A. Unexhausted Claims May Be Deleted By The Prisoner Or Dismissed By The Court.

Petitioner's opening contention is its most extreme: that faced with a mixed petition, a district court may not dismiss, or allow a prisoner to withdraw, unexhausted claims. Instead, the court must dismiss the petition in its entirety. Pet. Br. 17-19. The result, of course, would often be the same as in this case: AEDPA's limitations period would preclude a post-exhaustion federal petition and hence federal-court review of *any* of the prisoner's claims, even those that had been exhausted prior to an initial timely filing.

The State's position is flatly foreclosed by *Rose*. In that case, a majority of the Court expressly held that a prisoner who files a mixed petition is faced with the "choice of returning to state court to exhaust his claims *or of amending or resubmitting the habeas petition to present only exhausted claims to the district court.*" 455 U.S. at 510 (emphasis added). The language relied on by petitioner – instructing dismissal of the entire petition for "total exhaustion" – governs only if the prisoner does not elect to withdraw his unexhausted claims. *Id.* at 509; *see also id.* at 514, 520 (majority opinion); *id.* at 520 (plurality opinion). Indeed, in other litigation, petitioner has conceded that *Rose* entitles a prisoner to delete unexhausted claims from a mixed petition. *See Calderon v. U.S. Dist. Ct.*, 134 F.3d 981, 986 (9th Cir. 1998) ("The State does not question the district court's authority to permit [the prisoner] to amend his original petition by deleting the unexhausted claims. Nor could it.").

In fact, the removal of unexhausted claims from a mixed petition is often handled more expeditiously, by having the

district court itself simply dismiss unexhausted claims without prejudice. *See, e.g., Zarvela v. Artuz*, 254 F.3d 374, 380 (2d Cir. 2001). But whether a court employs that sensible procedure or requires a prisoner to delete unexhausted claims, the end result is the same. There is no merit to petitioner's contention that a mixed petition may not be "purged" of unexhausted claims.

B. A Mixed Petition, Once Purged Of Unexhausted Claims, May Be Stayed.

Petitioner's fall-back argument is that even if unexhausted claims may be excised from a mixed petition, whether by prisoner deletion or district-court dismissal, a district court is without authority to stay the now-perfected petition. Instead, petitioner insists, a court must immediately adjudicate the merits of a purged petition – so that by the time a prisoner has completely exhausted remaining claims, there will no longer be any federal proceeding to which those claims might "relate back" by amendment. Pet. Br. 19-20. Petitioner is incorrect. As the State has acknowledged before, there is no support – "specific" or otherwise – for the "assertion that district courts do not have authority to stay fully exhausted petitions." *Calderon*, 134 F.3d at 988 ("pressed at oral argument, the State [of California] was unable to muster any specific support" for its position).

1. District courts have inherent authority to issue stays in proceedings before them. "[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936); *see also Arkadelphia Milling Co. v. St. Louis Southwestern Ry. Co.*, 249 U.S. 134, 146 (1919) (power to stay proceedings is "inherent in every court" retaining jurisdiction over an action); *Clinton v. Jones*, 520 U.S. 681, 683 (1997) (district court has "broad discretion to stay proceedings as an incident to control of its own docket").

There is nothing to suggest that courts do not enjoy the same inherent authority in the habeas context. Indeed, six Justices of this Court have already expressly or impliedly acknowledged a district court's power to stay federal proceedings pending complete exhaustion. *See Duncan*, 533 U.S. at 182 (Souter, J., concurring) ("nothing bars a district court from retaining jurisdiction pending complete exhaustion[]"); *id.* at 182-83 (Stevens, J., concurring) ("no reason" why district court should not "stay further proceedings" pending exhaustion); *id.* at 192 (Breyer & Ginsburg, JJ., dissenting) (referring to Justice Stevens' "sound suggestion" that courts stay mixed petitions pending exhaustion); *Martinez-Villareal*, 523 U.S. at 650 (Scalia & Thomas, JJ., dissenting) (noting that district court "did not hold" respondent's claim "in abeyance" when it denied his habeas petition). No Justice of this Court has expressed a contrary view.

Nor does a stay of a perfected petition offend *Rose* or the comity principles on which *Rose* is based. *Rose* holds that a federal district court may not *consider* a habeas claim before it has been fairly presented to the state courts. 455 U.S. at 515; *cf.* 28 U.S.C. § 2254(b)(1) (federal habeas petition may not be "granted" prior to exhaustion). It would be an affront to comity and state sovereignty, the Court has explained, for a "federal district court to upset a state court conviction without [affording] an opportunity to the state courts to correct a constitutional violation." *Darr v. Burford*, 339 U.S. 200, 204 (1950). A *stay* of fully *exhausted* claims, on the other hand, is entirely consistent with *Rose* and does nothing to intrude on state prerogatives.

In fact, a stay of a mixed petition in its entirety is also fully consistent with *Rose*'s prohibition on adjudication of unexhausted claims. Whether or not a district court first dismisses unexhausted claims from a mixed petition, a stay of federal proceedings advances the principle that federal courts "should defer action," *id.*, while state courts consider the merits of a prisoner's claims in the first instance. At least

two federal courts of appeals have so held, authorizing district courts to stay mixed petitions in their entirety. *See Freeman v. Page*, 208 F.3d 572, 576 (7th Cir. 2000) (Easterbrook, J.); *Crews v. Horn*, 360 F.3d 146 (3d Cir. 2004); *see also Duncan*, 533 U.S. at 182-83 (Stevens, J., concurring) (suggesting that entire petition may be stayed). And that procedure has the added advantage of judicial economy: because all originally-filed claims are pending in abeyance, there is no need for a prisoner to amend his petition to add subsequently exhausted claims when he returns to federal court. *See Crews*, 360 F.3d at 154 n.5. But the Court need not decide in this case whether staying an entire mixed petition is permissible. It is enough here that a mixed petition may be purged of unexhausted claims, and that, once it is, a district court enjoys its customary authority to issue a stay.

2. Petitioner argues that a stay would "contravene[] this Court's admonition that federal courts have a 'virtually unflagging obligation . . . to exercise the jurisdiction given them.'" Pet. Br. 10, 23 (quoting *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817-18 (1976)). But *Colorado River* and the principle it establishes apply when a district court *dismisses* an action and thus relinquishes federal jurisdiction. 424 U.S. at 810; *see Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 716 (1996) (only under exceptional circumstances may federal court "deny[] a federal forum" by refusing to exercise jurisdiction). A stay, on the other hand, does not relinquish a court's jurisdiction; rather, the district court retains jurisdiction over the action while it is in abeyance. Accordingly, a stay does not violate any obligation of the federal courts to exercise their jurisdiction. "Unlike the outright dismissal or remand of a federal suit . . . an order merely staying the action does not constitute abnegation of judicial duty. On the contrary, it is a wise and productive discharge of it. There is only postponement of decision for its best fruition." *Quackenbush*, 517 U.S. at 721 (internal quotations omitted).

Petitioner's argument from *Colorado River* is not only incorrect but also inconsistent with her own position. It is petitioner, after all, who urges that a district court faced with a mixed petition must *dismiss* it outright and in its entirety – despite the fact that exhaustion is not a jurisdictional requirement, *see supra* at 6, so that this would constitute a relinquishment of the jurisdiction vested in the court. And it is most unlikely that petitioner would argue that *Rose* itself is in conflict with *Colorado River*, on the theory that it prevents district courts from ruling on unexhausted claims over which they have jurisdiction. Petitioner's reading of *Colorado River* is illogical as well as insupportable.

3. Petitioner also argues that a stay of a timely filed and fully exhausted petition is somehow prohibited by AEDPA. Pet. Br. 20-23. Nowhere in her brief, however, does petitioner identify a provision of AEDPA that actually precludes issuance of a stay. That is because there is none.

The two provisions of AEDPA at issue in this case are the one-year statute of limitations, 28 U.S.C. § 2244(d)(1), and the rule that a federal habeas provision "shall not be granted unless it appears that," *inter alia*, "the applicant has exhausted the remedies available in the courts of the State," *id.* § 2254(b)(1). The stay procedure petitioner is challenging is not at odds with either of those provisions. That procedure may be invoked only when, as in this case, an initial federal petition is filed within the one-year period. And the issuance of a stay obviously does not constitute a pre-exhaustion "grant[]" of a federal petition prohibited by § 2254(b)(1). Nothing in AEDPA by terms overrides a district court's inherent authority to issue a stay, and that should be the end of the matter. *See, e.g., Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999) (where "statutory language provides a clear answer," inquiry is at an end).

Faced with a complete absence of textual support, petitioner falls back on a sort of hybrid policy-legislative history argument: that issuance of a stay is in practical tension with

the goal of the one-year statute of limitations, which is to "protect the federal system from being forced to hear stale claims." Pet. Br. 21 (quoting *Carey v. Saffold*, 536 U.S. 214, 216 (2002)). In other words, some extra-textual purpose of the statute of limitations may be thwarted if a claim, timely when filed, becomes stale before it is decided.

The actual provisions of AEDPA foreclose that position. Nowhere does the statute suggest that the passage of time between filing and decision may make a claim inappropriate for federal adjudication. On the contrary, AEDPA specifically provides for unlimited tolling of the statute of limitations while state post-conviction proceedings are pending, 28 U.S.C. § 2244(d)(2), making clear that Congress fully contemplated a substantial lapse of time between filing and adjudication. And there is nothing in *Carey* – the only case cited by petitioner – to suggest otherwise. *Carey rejects* the State of California's argument against tolling during certain portions of state habeas proceedings, 536 U.S. at 219-20, and provides no support for the idea that AEDPA's concern with "staleness" requires anything more than the filing of a timely petition.

Petitioner's argument also fundamentally misconceives the relationship between a stay of proceedings and a statute of limitations. On petitioner's view, a stay of proceedings is inappropriate if it would avoid what otherwise would be a time bar. But on this Court's view, the opposite is true: a stay may be appropriate precisely *because* it would avoid what otherwise would be a statute-of-limitations problem. *See, e.g., Wilton v. Seven Falls Co.*, 515 U.S. 277, 288 (1995) (as between staying or dismissing an action in favor of parallel state proceedings, "a stay will often be the prefer[red] course, because it assures that the federal action can proceed without risk of a time bar"); *Deakins v. Monaghan*, 484 U.S. 193, 203 n.7 (1988) (approving stay because, "unless [the federal court] retained jurisdiction during the pendency of the state proceeding, a plaintiff could be barred permanently

from asserting his claims in the federal forum by the running of the applicable statute of limitations").[6] Petitioner's theory – that a statute of limitations is by itself somehow at odds with exercise of a district court's inherent authority to stay an action – cannot be reconciled with this established law.

C. Subsequently Exhausted Claims May Be Added To A Stayed Petition By Way Of Amendment Under Rule 15.

Finally, petitioner argues that a district court may not allow amendment of a stayed petition with later-exhausted claims once the limitations period has expired. Pet. Br. 27-36. The question of amendment generally does not arise in circuits that allow for the stay of an entire mixed petition: if the district court has stayed both exhausted and unexhausted claims, there is no need for a prisoner to amend his original filing in order to have subsequently-exhausted claims from that petition considered when he returns to federal court. *See supra* at 13-14. But if a district court must dismiss unexhausted claims and stay only the remainder of the petition, then a stay without the possibility of amendment would be pointless: absent amendment, there would be no reason for a prisoner to seek a stay rather than pursue his exhausted claims immediately. In fact, petitioner is incorrect, and dis-

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[6] Federal circuit courts also have long held that when a timely-filed case suffers from a non-jurisdictional procedural defect, the appropriate course is to stay the action in order to avoid a time bar. *See, e.g., Burris v. Farley*, 51 F.3d 655, 659 (7th Cir. 1995) (Easterbrook, J.) (plaintiffs asserting employment discrimination claims and facing exhaustion requirements "may protect themselves by filing . . . in time to satisfy the statute of limitations and asking the district court to suspend proceedings" until additional claims can be exhausted and added to original complaint); *Oubichon v. N. Am. Rockwell Corp.*, 482 F.2d 569, 571 (9th Cir. 1973) ("In cases where the state agency has been bypassed, the district court should retain jurisdiction for a period sufficient to allow the employee to seek redress through the state agency.").

trict courts may, in their discretion, permit amendment of stayed petitions through Rule 15(c).[7]

1. Petitioner's sole argument against use of Rule 15(c) to permit post-exhaustion amendment is that Rule 15(c) does not apply to habeas proceedings at all. Pet. Br. 30-36. The text of the federal habeas statute says otherwise. Section 2242 – which petitioner fails even to mention – speaks directly to the issue, and it provides that an "[a]pplication for a writ of habeas corpus . . . may be amended or supplemented as provided in the rules of procedure applicable to civil actions." 28 U.S.C. § 2242. The "rules[] of procedure" that governs amendments is Rule 15. Under the plain terms of § 2242, that rule applies in ordinary habeas cases.[8]

This is not a controversial point. The courts of appeals that have considered the issue unanimously agree that Rule 15(c) applies to habeas cases. *See, e.g.*, *Dean v. United States*, 278 F.3d 1218, 1222 (11th Cir. 2002); *Fama v. Comm'r of Corr. Servs.*, 235 F.3d 804, 815-16 (2d Cir. 2000) (Calabresi, J.); *United States v. Pittman*, 209 F.3d 314, 317 (4th Cir. 2000); *United States v. Duffus*, 174 F.3d 333, 337 (3d Cir. 1999); *United States v. Craycraft*, 167 F.3d 451,

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[7] This normal operation of Rule 15(c) – under which the relation-back rule permits amendment of a petition that is still pending by virtue of a stay – is different from the use of Rule 15(c) when the initial petition has been dismissed. The latter issue, which arises in the decision below in a very limited context, is addressed *infra* at 28-29.

[8] Section 2242, *see* Pub. L. No. 80-773, 62 Stat. 869, 965 (1948), predates enactment of AEDPA. But there is no provision in AEDPA that repeals or modifies § 2242 in ordinary habeas cases. And when Congress intended to modify application of Rule 15 in the habeas context, it did so expressly: AEDPA does provide for a specially "strict standard" for amendment in a limited class of capital cases qualifying for "expedited review." Petitioner cannot account for Congress' considered decision to restrict application of Rule 15 and the relation-back doctrine in one and only one narrow category of cases. *See Calderon v. Ashmus*, 523 U.S. 740, 750 (1998) (Breyer, J., concurring) (Rule 15's "liberal standard for amendment" applies in habeas cases outside statutorily defined group of capital cases eligible for expedited review).

456-57 (8th Cir. 1999). Petitioner does not cite a single case supporting her contrary view.

2. With an argument contrary to plain text and absent any case-law support, petitioner again argues that the very existence of AEDPA's statute of limitations precludes use of the relation-back doctrine to permit amendments outside the limitations period. Pet. Br. 30-36. That makes no sense. The entire purpose of the relation-back rule is to allow for amendments that would otherwise be barred by a statute of limitations; that is precisely the situation to which Rule 15(c) is addressed. *Id.* at 30; *see also* 6A Charles Alan Wright et al., *Federal Practice and Procedure* § 1497 (1990) ("[T]he rationale of the relation back rule is to ameliorate the effect of the statute of limitations . . . ."). If the existence of a statute of limitations is *per se* inconsistent with use of Rule 15(c) to allow post-expiration amendment, then Rule 15(c) has no practical application at all – in the habeas or any other context.

Petitioner relies heavily on the unremarkable fact that many of AEDPA's sponsors believed that a one-year statute of limitations would help to address the delays then prevalent in habeas litigation, especially in capital cases. Pet. Br. 32-35. That does nothing to distinguish AEDPA's statute of limitations from the limitations periods in most civil statutes – and thus nothing to cabin the implications of petitioner's position for Rule 15(c). And to the extent Congress was concerned generally with delay, it addressed those concerns by requiring that federal habeas petitions be filed within a year. Application of Rule 15(c), which permits "relation back" only to a timely-filed petition, is entirely consistent with that requirement.

Whether Rule 15(c) applies to habeas cases is a question of statutory construction resolved by the plain terms of § 2242. Even if there were some tension between that provision and the statute of limitations, the more specific commands of § 2242 would control. *See, e.g.*, *Morales v. Trans-*

TransWorld Airlines, Inc., 504 U.S. 374, 384 (1992) ("the specific governs the general" in statutory construction). Petitioner's position – which would bar even the most technical and helpful of amendments, like those to more clearly state the basis for a federal claim – was not adopted by Congress.

3. The only real question here, which petitioner alludes to elsewhere in her brief, Pet. Br. 19, arises from the fact that some of the claims raised in Ford's second petitions were not raised in his first. *Slack* makes clear that a federal court is not categorically barred from considering claims raised in a second petition that were not pressed in an initial mixed petition but were subsequently exhausted. 529 U.S. at 487-88. It seems to follow that a district court may permit relation-back of the same category of claims: those exhausted after dismissal of a mixed petition and then presented for the first time to a federal court.[9] But there is no need to decide that question here. The decision below applies the relation-back doctrine only to those claims pressed in Ford's *first* petitions. Pet. App. 35. Claims newly raised in the second petitions were disposed of on different grounds and are not now before the Court. *Id.* at 36-39; *see supra* at 5 n.5.

III. THE STAY PROCEDURES CHALLENGED BY PETITIONER ARE SENSIBLE AND WORKABLE.

As shown above, rigid application of *Rose*'s "total exhaustion" procedure, combined with AEDPA's one-year statute of limitations, threatens the well-established principle that a prisoner who timely files a mixed petition may refile a perfected one after exhausting state remedies. As also demonstrated, there is no indication – textual or otherwise – that Congress actually intended that result. *See also Duncan*, 533 U.S. at 183 (Stevens, J., concurring) (referring to "reasonable belief that Congress could not have intended to bar federal habeas review for petitioners who invoke the court's jurisdic-

[9] The court's exercise of discretion in considering such an amendment would be guided by ordinary standards under Rule 15(c).

tion within the 1-year interval prescribed by AEDPA"). Faced with that problem, the lower courts have crafted a solution, in the form of stay procedures, that protects the continued vitality of cases like *Rose*, *Martinez-Villareal*, and *Slack* without overstepping district court authority. That solution is sensible and workable, and far preferable to any of the alternatives that would likely emerge in its absence.

1. Petitioner's brief may create the impression that these stay procedures are wholly a Ninth Circuit phenomenon. That is not so. In fact, as described below, it is the Ninth Circuit's failure to *fully* adopt the stay procedures used elsewhere that led to the precise contours of the decision below. At least five other circuits, on the other hand, have adopted the more standard stay procedures put at issue by petitioner.

The basic contours of the rule are the same from circuit to circuit. A district court faced with a mixed petition has the authority to hold the federal proceedings in abeyance, either by staying the whole petition or by dismissing unexhausted claims and staying the remainder. Where the court dismisses unexhausted claims, it may permit the prisoner to reinstate those claims, once they are exhausted, by way of amendment under the "relation back" doctrine. The authority to stay, like the authority to permit amendment, is discretionary. But if AEDPA's limitations period is likely to bar the filing of a perfected petition after exhaustion, then denial of a stay generally will constitute an abuse of discretion. In other words, a stay will be "preferable" in many cases and will be "the only appropriate course . . . where an outright dismissal could jeopardize the timeliness of a collateral attack." *Zarvela*, 254 F.3d at 380 (internal quotation omitted); *see also Freeman*, 208 F.3d at 576 (Easterbrook, J.); *Nowaczyk v. Warden*, 299 F.3d 69, 79 (1st Cir. 2002); *Palmer v. Carlton*, 276 F.3d 777, 781 (6th Cir. 2002); *Crews* , 360 F.3d at 152.[10]

[10] The Eighth Circuit has rejected that authority and taken the contrary view. *See, e.g., Akins v. Kenney*, 341 F.3d 681 (8th Cir. 2003).

2. Petitioner worries that it may be difficult for judges to determine whether the AEDPA limitations period will expire before a prisoner can exhaust state remedies and return to federal court. Pet. Br. 24. In the large number of cases like this one, of course, the inquiry will be straightforward: if the limitations period has run *before* the district court addresses the exhaustion issue, then the judge can be certain that AEDPA will present a time-bar problem for any future federal filings. And even in cases in which it is less obvious whether AEDPA will threaten a prisoner's ability to return to federal court, the marginal imposition on district judges is insubstantial. Under *Rose*, those judges already are charged with determining whether each claim presented has been fully exhausted, a complicated question that requires review of the entire record of proceedings. Answering the statute of limitations question should require little additional work.

3. Petitioner's more sustained criticism is that stay procedures encourage undue delay and abusive litigation. Pet. Br. 32-33, 35-36. But non-capital petitioners like Ford – the vast majority of habeas petitioners – have no incentive whatsoever to engage in dilatory tactics. For non-capital prisoners, the point is to move as quickly as possible toward potential relief through federal-court adjudication of a fully exhausted petition. *See Rose*, 455 U.S. at 520 (prisoner's "principal interest, of course, is in obtaining speedy federal relief on his claims").

In any event, there are ample means of preventing vexatious litigation of the sort the State hypothesizes. First, AEDPA itself checks abusive litigation practices by permitting district courts to dismiss even mixed petitions on the merits if they raise insubstantial claims. 28 U.S.C. § 2254(b)(2); *see Duncan*, 533 U.S. at 182-83 (Stevens, J., concurring). Concerns that prisoners will prolong federal stays by "running out the clock" with repeated state filings are addressed by the states' own procedural rules. *See Slack*, 529 U.S. at 489 (states "remain[] free to impose proper procedural bars to restrict repeated returns to state court for post-conviction proceedings").

Perhaps most important, discretionary stay procedures give district courts the flexibility they need to prevent vexatious or repetitive litigation. Though granting a stay ordinarily will be appropriate when a post-exhaustion filing otherwise would be time-barred, district courts may deny a stay or permission to amend when a prisoner has not exercised reasonable diligence. *See Zarvela*, 254 F.3d at 380-81. They may also, in their discretion, condition or limit their stays and the amendments they will allow. If a prisoner may be contemplating the filing of multiple mixed petitions, for instance, then a district court can grant a stay but order that the prisoner present only fully exhausted claims in his next federal pleading, on pain of dismissal with prejudice. *See Slack*, 529 U.S. 489. If the state would be unfairly prejudiced by amendment under the relation-back doctrine, then the court can deny leave to amend. *See supra* at 20 n.9. If a court is worried that a prisoner will unduly delay pursuing state remedies, then it can put time limits on its stay. In the Second and Sixth Circuits, for example, a stay pending state exhaustion is ordinarily conditioned on the prisoner's initiation of exhaustion within 30 days, and a return to federal court within 30 days after exhaustion is completed. *Zarvala*, 254 F.3d at 381; *see Palmer*, 276 F.3d at 781 (approving Second Circuit approach). This list is not exhaustive. The point is that stay procedures, rooted in the equitable power and sound discretion of district courts, allow for a case-specific approach that precludes abusive tactics without foreclosing federal review for diligent and good-faith litigants.[11]

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[11] Petitioner suggests that a stay pending exhaustion would have the same effect as tolling AEDPA's statute of limitations during federal proceedings, contravening *Duncan*. Pet. Br. 35-36. But the discretionary nature of the stay procedures at issue distinguishes them importantly from automatic operation of a tolling provision. In any event, of course, the majority in *Duncan* did not comment at all on the stay procedure endorsed by Justices Stevens and Souter. *See* 533 U.S. at 181 (reserving questions);

4. The stay procedures adopted by lower courts respond to a real problem. If for some reason they were unavailable, then other responses would take their place. And the most likely alternatives would raise serious concerns that the stay procedures do not.

The alternative that petitioner appears to endorse, for instance, would require that at the same time a prisoner files a federal petition, he also file a "protective" petition in state court in order to trigger AEDPA's state-court tolling provision. Pet. Br. 18 n.5 (citing *Akins v. Kenney*, 341 F.3d 681 (8th Cir. 2003)). The idea, it seems, is that if petitioner can run out his "protective" state proceedings – and the concomitant tolling – long enough, there will still be time to refile in federal court after a dismissal of a mixed petition. *Id.* It is hard to square that suggestion with petitioner's concerns about comity. By encouraging prisoners to waste the time of state courts in order to take advantage of a tolling provision, and requiring state courts to adjudicate claims that may well be exhausted already, petitioner's proposal undermines comity principles.

Less troubling on comity grounds, but still wildly inefficient, is an alternative that would shift the burden to the district courts. If those courts cannot stay exhausted claims in mixed petitions, then represented prisoners may be advised to "take precautionary measures to guard against . . . being penalized [if] the district court judge takes a long time to rule upon the exhaustion status of the petition." 1 Randy Hertz & James S. Liebman, *Federal Habeas Corpus Practice and Procedure* § 5.2b (4th ed. 2001). Specifically, prisoners could ask district courts for immediate emergency rulings on exhaustion, and seek equitable tolling if such rulings are not forthcoming. *Id.* Even assuming that district courts could and would act quickly on such requests, the procedure, as its

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id. at 182 (Stevens, J., concurring) (conclusions "unaffected by [majority] decision construing a single provision of [AEDPA]").

proponents acknowledge, would be "cumbersome and time-consuming," at the expense of the federal courts. *Id.*

Another route is the one actually taken by the Ninth Circuit which, as noted above, has adopted stay procedures slightly different from those used in other circuits. In the Ninth Circuit, a district court is permitted neither to stay an entire mixed petition nor to dismiss unexhausted claims on its own. Instead, unexhausted claims may be purged, and remaining claims stayed, only if the prisoner himself requests withdrawal of the unexhausted claims. *See Calderon*, 134 F.3d at 986; Pet. App. 22. The end result will in many cases be the same (though with the unnecessary expenditure of substantial resources by both prisoner and court). But because the prisoner must initiate the process, the question of advisements arises: how much must the district court or magistrate judge tell the prisoner about his withdrawal option? Pet. App. 24-25. That issue – the narrow one addressed below – is avoided altogether by the more common stay procedure, in which the district court simply presents the standard *Rose* options and then may itself stay the action if the prisoner chooses to pursue complete exhaustion.

IV. THIS COURT SHOULD AFFIRM THE DECISION BELOW.

1. For the reasons given above, this Court should reject petitioner's broad-based attack on the stay procedures adopted by the lower courts, and hold that a district court faced with a mixed petition and a looming or expired AEDPA deadline ordinarily should stay the federal proceedings and then, if necessary, permit amendment under the relation-back doctrine after exhaustion of state remedies. Under that rule, the decision below should be affirmed.

As noted above, the Ninth Circuit employs slightly different stay procedures than other circuits. But the court below has adopted the basic position that a district court may stay federal proceedings – by allowing a prisoner to delete unexhausted claims, and then holding the remainder of the

petition in abeyance – and may allow post-exhaustion amendment under Rule 15(c). *See Calderon*, 134 F.3d at 989; Pet. App. 23-24. The decision below amounts to a holding that the district court in this case erred by failing to grant Ford's stay motions, given that Ford otherwise would be time-barred when he attempted to return to federal court after fully exhausting state remedies. Pet. App. 25 ("granting a stay is 'the only appropriate [remedy] where an outright dismissal could jeopardize the timeliness of a collateral attack'") (quoting *Zarvela*, 254 F.3d at 380).

If, as *amicus* urges, the Court endorses the stay proceedings challenged by petitioner, then that holding is surely correct. Nothing about Ford's case would have taken it out of the ordinary rule that a stay should be granted when the one-year limitations period would otherwise prevent post-exhaustion review. On the contrary, Ford acted with due diligence throughout his habeas proceedings. He filed timely habeas petitions that included exhausted as well as unexhausted claims. In reliance on the magistrate judge's assurances that dismissal would be "without prejudice," he promptly initiated further state post-conviction proceedings, and then promptly returned to federal court when exhaustion was completed. Even under a 30-day conditioned stay like the Second Circuit's, *see supra* at 23, Ford – who filed in state court within three weeks of the federal dismissal, and in federal court again one week after exhaustion – would be entitled to have his petitions reviewed.

The court below correctly held that the district court erred when it failed to hold Ford's exhausted claims in abeyance pending exhaustion, and then permit amendment of the stayed petition to include the now-exhausted claims. Pet. App. 23-26. The Court should affirm on those grounds.

2. Even if the Court rejects the stay procedures at issue, it should affirm the decision below. Under *Rose*, it should be clear beyond dispute that respondent was entitled to delete his unexhausted claims from his mixed petition and to proceed with his exhausted claims. *Supra* Part II.A. But as the court below correctly held, even that limited right is meaningful in a post-AEDPA world only if a *pro se* prisoner is advised that his other "choice" – dismissal of the entire petition for complete exhaustion – may preclude federal review of any of his claims. Pet. App. 27-30.

The magistrate judge purported to give Ford a choice: either withdraw his unexhausted claims and proceed only on the exhausted ones, or the court would dismiss his petitions in their entirety and "without prejudice" so that he could fully exhaust. But at the time the magistrate judge so instructed, there was really no choice at all. The AEDPA limitations period had expired, so that (absent equitable tolling) federal review of *all* of Ford's claims – including those already exhausted – would be forever precluded if his petitions were dismissed. As the Ninth Circuit concluded, the magistrate judge's offer of a dismissal "without prejudice" misled Ford into believing that dismissal for complete exhaustion was a viable alternative to proceeding with his unexhausted claims only. Pet. App. 27-28.[12]

This Court should affirm the Court of Appeals' holding that a magistrate or district judge must advise a prisoner of a potential AEDPA time-bar in order to make the prisoner's choice a meaningful one. *Id.* at 29-30. That holding is con-

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[12] That error was compounded when the magistrate judge made dismissal of the entire petition appear to be the preferred course of action. First, the magistrate judge cast the alternative – deleting unexhausted claims – in a decidedly negative light, stating that he would "not later rule" on unexhausted claims, and going so far as to require that Ford formally waive any rights to assert those claims. J.A. 52. Then, in response to Ford's express concerns about the AEDPA time bar, the magistrate judge suggested that the statute of limitations on at least some of Ford's claims had not run. J.A. 53 (limitation period "begins to run only when the factual predicate of the claims could have been discovered through the exercise of due diligence"). Finally, by presenting the choice so that complete dismissal was the default to which Ford had to object, Pet. App. 17, 20, the magistrate judge likely conveyed that dismissal was the norm.

sistent with this Court's own decisions, which recognize that certain straightforward advisements will sometimes be necessary in habeas cases so that *pro se* prisoners can make informed judgments and do not inadvertently forfeit their rights. *See Castro v. United States*, 124 S. Ct. 786, 791-92 (2003) (district court may not recharacterize *pro se* litigant's motion as habeas petition without first informing litigant of its intent, warning that subsequent petitions will be subjected to "second or successive" restrictions, and providing litigant with opportunity to withdraw or amend filing). It imposes no substantial burden on district courts; *Rose* already requires a colloquy with prisoners and, as noted above, identifying time-bars will add little incremental burden. *Supra* at 22. And without such an advisement, prisoners like Ford will regularly and through no fault of their own be completely deprived of federal court review of timely-filed and exhausted constitutional claims. *See Lonchar v. Thomas*, 517 U.S. 314, 324 (1996) ("Dismissal of a first habeas petition is a particularly serious matter, for that dismissal denies the petitioner the protection of the Great Writ entirely, risking injury to an important interest in human liberty.").

The Court also should affirm the Court of Appeals' holding that Ford was entitled to relief for the improper dismissal of his first petitions without the necessary advisements. Pet. App. 31-33. Properly understood, the court's decision regarding Rule 15(c) was an extremely narrow one, tailored to the particular remedial problem raised by this case: Because the magistrate judge dismissed Ford's first petitions "without prejudice" and led Ford to believe he could return to federal court upon exhaustion, Ford had no reason to appeal those dismissals. Other courts of appeals facing the same circumstances – a first petition improperly dismissed, a justifiable failure to appeal, then a second time-barred petition – have invoked their inherent power to provide equitable relief. Some have simply treated the district court's dismissal of the initial petition as though it never happened, so that the petition is still "pending" for relation-back purposes, *see Zarvela*,

254 F.3d at 377, 383; others have applied the equitable doctrine of *nunc pro tunc*, under which the perfected petition is treated as though it were filed on the date of the initial petition, *Anthony v. Cambra*, 236 F.3d 568, 574 (9th Cir. 2000). The use of Rule 15(c) below is to precisely the same effect, and equally consistent with the courts' inherent authority to grant equitable relief.

Contrary to petitioner's suggestion, Pet. Br. 37-38, the Court of Appeals' Rule 15(c) decision does not have broad application. We are aware of no case in the Ninth Circuit applying that holding beyond its facts: where there has been an improper and prejudicial dismissal of a first habeas petition, and the prisoner had no way of knowing that an appeal was in order. Indeed, petitioner has cited no other case at all employing the remedial device used below. And if this Court now instructs district courts faced with mixed petitions to stay rather than dismiss when a return to federal court would otherwise be time-barred, then there should be no further need for this or any other remedy.

3. At a minimum, this Court must remand for consideration of equitable tolling. The Court of Appeals noted that "[a]lthough we need not reach the question here, Ford would also be entitled to relief under equitable tolling principles." Pet. App. 35 n.15. As set forth in the *amicus curiae* brief of the Federal Defenders in the Ninth Circuit, AEDPA is plainly subject to equitable tolling, and Ford presents a textbook case for application of the rule. *See* Br. of Fed. Defenders in the Ninth Cir., *Amici Curiae*, in Supp. of Respondent; *supra* at 23, n.11. If the Court does not affirm the decision below, then it should remand to give the Ninth Circuit an opportunity to rule on the issue.[13]

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[13] Though petitioner makes a passing argument against equitable tolling, Pet. Br. 26, that issue is not properly before the Court. Presumably because the lower court did not rule on the question, petitioner did not include equitable tolling in the questions presented in its certiorari petition, *see* Cert. Pet. i, and did not even mention the issue in the petition itself.

CONCLUSION

The judgment should be affirmed.

Respectfully submitted,

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Dated: March 29, 2004

Petitioner has waived any right to argue against equitable tolling in this Court.

MOTION FILED

MAR 29 2004

FOR ARGUMENT

No. 03-221

In The

Supreme Court of the United States

CHERYL K. PLILER, Warden of California State Prison – Sacramento,

Petitioner,

v.

RICHARD HERMAN FORD,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF FEDERAL DEFENDERS IN THE NINTH CIRCUIT, *AMICI CURIAE*, IN SUPPORT OF RESPONDENT

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MOTION FOR LEAVE TO FILE A BRIEF AS *AMICI CURIAE*

Amici curiae are federal public defender offices and community defender offices in judicial districts in the Ninth Circuit. *Amici* hereby respectfully move for leave to file the attached *amici curiae* brief in this case. The consent of the attorney for the Respondent has been obtained. The consent of the attorney for the Petitioner was requested but refused.

The interest of *amici* in this case arises from the fact that they are often appointed to represent indigent criminal defendants in federal habeas corpus actions challenging state court judgments, frequently after the petitioner has initiated the proceeding *pro se*. Since the advent of the Antiterrorism and Effective Death Penalty Act, and its one-year statute of limitations, a recurring issue in many cases in which *amici* are appointed is whether the federal action has been filed within the one-year period and, if not, whether there is a basis for the court to consider the late filed petition or claims. *Amici* support the judgment in favor of Respondent in the Court of Appeals below, and respectfully urge the Court to affirm it on appeal.

Amici's brief addresses the issue of equitable tolling. In the judgment below, the Ninth Circuit stated that "[a]lthough [it] need not reach the question here, Ford would also be entitled to relief under equitable tolling principles." Petition for Writ of Certiorari, Appendix A-35. The court reasoned that "[t]he district court's error in failing properly and fully to inform Ford about his options with respect to the mixed petitions and in misleading him

as to the legal effect of a dismissal of his petitions were 'extraordinary circumstances' beyond Ford's control that would require equitable tolling of AEDPA's statute of limitations." *Id.*

Petitioner did not seek certiorari on the equitable tolling issue. As *amici*'s brief makes clear, the lower federal courts have invoked the time-honored doctrine of equitable tolling to ameliorate the harsh consequences of the one-year statute of limitations as appropriate on a case-by-case basis, and Respondent has a particularly strong case for tolling. *Amici* believe that if the Court is inclined to consider whether equitable tolling applies in the case at bar, the Court should remand the case for resolution of this highly fact-based question. Nevertheless, *amici* submit this brief in the event that the Court decides to address the equitable tolling issue, whether by determining if Respondent is entitled to tolling; addressing the availability of equitable tolling generally under the Anti-terrorism and Effective Death Penalty Act; or by announcing standards to address tolling claims under the Act.

Amici's brief "brings to the attention of the Court relevant matter not already brought to its attention by the parties," and therefore "may be of considerable help to the Court." Sup. Ct. R. 37.1. Counsel for Petitioner withheld consent to the filing of *amici*'s brief on the grounds that it addresses an issue that was not a holding in the Ninth Circuit and would bring "tangential" issues before this Court. *Amici* respectfully suggest that their brief addresses an issue that provides a powerful alternative basis

for finding Respondent's petitions timely, and an issue of utmost importance to habeas petitioners they represent.

Respectfully submitted,

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INTEREST OF *AMICI CURIAE*

Amici are federal public defender offices and community defender organizations for judicial districts in the Ninth Circuit. *Amici* are often appointed as counsel in federal habeas corpus proceedings brought on behalf of indigent prisoners in state custody. The issues raised in this Court and the proceeding below are exceedingly important to *amici*, because they impact whether many prisoners will ever obtain federal merits review of their habeas claims.[1]

STATEMENT OF THE CASE

This case reflects the tension between the twin commands that habeas corpus petitioners (1) present all of their claims in state court before filing them in federal court (the "exhaustion requirement"), and (2) file all of their claims in federal court within the one-year limitation period of the Antiterrorism and Effective Death Penalty Act ("AEDPA"), 28 U.S.C. § 2244(d). The exhaustion requirement is a longstanding part of habeas law. In *Rose v. Lundy*, 455 U.S. 509, 510 (1982), this Court held that district courts must dismiss petitions containing both exhausted and unexhausted claims ("mixed petitions"), "leaving the prisoner with the choice of returning to state court to exhaust his claims or of amending or resubmitting the habeas petition to present only exhausted claims to the district court."

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[1] No counsel for any party has authored this brief in whole or in part, and no person or entity, other than the office of the Federal Public Defender for the Central District of California, made any monetary contribution to its preparation or submission. *See* Sup. Ct. R. 37.6. Respondent has consented to the filing of this brief, and Respondent's letter of consent has been lodged with the Clerk of the Court. Petitioner has not consented to the filing of this brief, and therefore *amici* have filed a motion for leave to file the brief. Sup. Ct. R. 37.3.

On April 24, 1996, AEDPA was enacted, imposing for the first time a one-year statute of limitations on the filing of federal habeas petitions. AEDPA's limitation period is tolled during the time a properly filed state habeas petition is pending, but not while a federal petition is pending. 28 U.S.C. § 2244(d)(2); *Duncan v. Walker*, 533 U.S. 167, 181-82 (2001). This case presents the scenario noted by several Justices in *Duncan*: that the statute of limitations can run while a timely filed but mixed petition is pending in district court, and before the court grants a motion to dismiss the petition for failure to exhaust state remedies. In such situations, absent equitable tolling, a stay of the exhausted claims, or some other mechanism, if the petitioner exercises his right under *Rose* to leave federal court, exhaust state remedies and refile a federal petition, he is barred from returning to federal court and litigating his claims by the statute of limitations. This is what happened to Respondent Richard Herman Ford ("Ford") in the district court.

In 1988, Ford was convicted in two separate state court actions of first degree murder and conspiracy to commit murder (the "*Weed*" case) and conspiracy to commit murder and attempted murder (the "*Loguercio*" case). Pet. App. A-16, A-18.[2] He was sentenced to life without the possibility of parole in *Weed*, and 36 years to life in *Loguercio*. *Id.* Both judgments were affirmed on appeal and both became final in 1993. *Id.* at A-16, A-19.

On April 24, 1996, AEDPA became effective. Under AEDPA's one-year statute of limitations, Ford was required to file any federal habeas petitions by April 24, 1997, within one year of AEDPA's enactment. Pet. App. A-21; 28 U.S.C. § 2244(d)(1). On April 19, 1997, Ford timely submitted *pro se* petitions challenging his judgments in both cases (the "first petitions"). Pet. App. A-16, A-19. Ford concurrently filed motions to stay the actions

[2] "Pet App." refers to the appendix filed with the petition for writ of certiorari.

on his exhausted claims while he presented any unexhausted claims in state court. *Id.* at A-14.

The State asserted that Ford had failed to exhaust state remedies. Pet. App. D-1, E-2. The magistrate judge found that some, though not all, of Ford's claims in each case were unexhausted, and gave Ford two options. "Petitioner was given the choice between dismissing the Petition without prejudice to refiling after exhaustion of the unexhausted grounds or proceeding on only the exhausted claims." Pet. App. D-1, D-2, E-2; *see also* Jt. App.[3] 51 (magistrate informs Ford that if he dismisses petition to exhaust state remedies, and relief is denied in state court, "a new Petition may be filed with this Court containing only those issues that have been fully exhausted"); *Id.* at 71 (same advice given in companion case). The magistrate did not inform Ford that AEDPA's limitation period had run about four months earlier while the first petitions were pending and that, as a result, a dismissal purportedly "without prejudice" would leave him unable to refile any claims in federal court, and effectively terminate his right to federal habeas review. Pet. App. A-14. The magistrate also recommended that the stay requests be denied on the ground that the court could not stay a mixed petition. Jt. App. 52-53, 82.

Ford opted to dismiss both petitions without prejudice to exhaust claims, and the magistrate recommended dismissal without prejudice. Pet. App. A-14, D-2, E-2. The district court adopted all of the magistrate's recommendations in each case. The *Weed* petition was dismissed without prejudice on October 14, 1997, and the *Loguercio* petition was dismissed on September 11, 1997. *Id.* at A-17, A-20.

After the dismissals, Ford promptly presented his unexhausted claims to state court. On September 29, 1997, 18 days after dismissal, Ford filed a state petition with the California Supreme Court seeking relief in the

[3] "Jt. App." refers to the joint appendix filed by the parties.

Loguercio case. Pet. App. A-17. On October 24, ten days after dismissal of the *Weed* petition, Ford submitted a state habeas petition in that case. *Id.* at A-20. On March 25, 1998, the California Supreme Court summarily denied both petitions. *Id.* at A-17, A-18, A-20.

One week later, on April 1, 1998, Ford refiled federal petitions in both cases (the "second petitions"). Jt. App. 84, 103, 105, 120. The State moved to dismiss on the ground that the second petitions were untimely. Pet. App. A-18, A-20, A-21. Ford argued that he had diligently litigated his state petitions and filed his second petitions in reliance on the court's statements that the dismissals "without prejudice" would allow him to return to federal court after exhausting his claims. *See id.* at B-4, C-4. The district court dismissed the second petitions with prejudice as time barred, and Ford never received federal merits review of any of his claims, including the dozen or more exhausted claims that were timely filed in the initial petitions. *Id.* at A-18, A-21; Jt. App. 35-46, 50, 59-72, 80, 84-120.

The Ninth Circuit reversed. The court held that the dismissals of the initial petitions had been improper. Pet. App. A-15. Ford's decision "to have his timely-filed federal habeas petitions dismissed without prejudice was an uninformed one," the court reasoned, because the magistrate failed to inform him of AEDPA's statute of limitations, and of his option under settled Ninth Circuit law to withdraw his unexhausted claims and seek a stay of the exhausted claims. *Id.* The court further held that because the dismissals were improper, Ford could claim the timely filing date of the first petitions and "relate back" to that date claims raised in the first petitions and reasserted in the second. *Id.* at A-31.

In a footnote, the Ninth Circuit stated that "[a]lthough [it] need not reach the question here, Ford would also be entitled to relief under equitable tolling principles." Pet. App. A-35. The court reasoned that "[t]he district court's error in failing properly and fully to inform Ford about his options with respect to the mixed petitions and in misleading him as to the legal effect of a dismissal

of his petitions were 'extraordinary circumstances' beyond Ford's control that would require equitable tolling of AEDPA's statute of limitations." *Id.* The court reiterated, however, that because it granted relief to Ford on other grounds, it was not resolving "any equitable tolling claim here." *Id.*

Amici submit this brief in the event that the Court decides to consider the equitable tolling issue, or to announce standards for considering tolling claims under AEDPA.

SUMMARY OF ARGUMENT

Equitable tolling is a flexible doctrine that permits courts to extend a statute of limitations on a case-by-case basis to prevent inequity. Although this Court has not ruled whether AEDPA's one-year limitation period may be equitably tolled, it has repeatedly held that limitation periods in federal statutes are presumptively subject to equitable tolling. The overwhelming consensus among the federal Courts of Appeals is that AEDPA's one-year period of limitation may be equitably tolled in appropriate cases. Equitable tolling of AEDPA's limitation period is consistent with this Court's case law, and with the text, structure, purpose and legislative history of AEDPA. Equitable tolling is appropriate where, as here, the petitioner has diligently pursued relief but, due to external circumstances, has been unable to timely file his claims. The situation presented here – the statute of limitations expiring before the district court dismisses a timely filed, *pro se* petition because it contains unexhausted claims – is an all too common occurrence that has eviscerated the right to federal habeas review for many prisoners. The lower courts should be permitted to continue to use equitable tolling to preserve prisoners' federal habeas rights in appropriate circumstances. Tolling is particularly appropriate where, as here, a *pro se* petitioner's right under *Rose* to resubmit a federal petition after exhausting state

remedies is threatened by AEDPA's one-year limitation period. *Slack v. McDaniel*, 529 U.S. 473, 487 (2000) ("the complete exhaustion rule is not to 'trap the unwary *pro se* prisoner' ").

ARGUMENT

I.

AEDPA'S "1-YEAR PERIOD OF LIMITATION" IS A STATUTE OF LIMITATION SUBJECT TO EQUITABLE TOLLING

A. Introduction

The doctrine of equitable tolling permits a court to deem a late filed action timely when " 'principles of equity would make the rigid application of a limitation period unfair.' " *Miller v. New Jersey State Dep't of Corrections*, 145 F.3d 616, 618 (3d Cir. 1998). In such cases, the policy of repose reflected in limitations periods, designed to protect defendants, is outweighed by "the interests of justice [that] require vindication of the plaintiff's rights." *Burnett v. New York Central R.R. Co.*, 380 U.S. 424, 428 (1965).

Equitable tolling is a longstanding and widespread practice, and limitations periods in federal statutes are presumptively subject to tolling unless tolling would be inconsistent with Congressional intent. *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 95-96 (1990); *Bowen v. City of New York*, 476 U.S. 467, 480 (1986). In deciding whether equitable tolling is available under a particular statute, courts often phrase the issue as whether the time limitation constitutes or is analogous to a statute of limitations, in which case tolling is available; or whether the limitation is a jurisdictional prerequisite to filing a claim, in which case tolling is unavailable and non-compliance with the deadline forever bars the claim. *See*,

e.g., *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 392-93 (1982).

As shown below, and as ten Circuit Courts of Appeals have concluded, AEDPA's one-year period of limitation is a statute of limitation that is subject to equitable tolling.

B. The Statutory Language

The limitation period applicable to the case at bar is contained in 28 U.S.C. § 2244(d). That provision states:

> (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of –
>
> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.
>
> (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be

counted toward any period of limitation under this subsection.[4]

C. Justice Stevens' Concurring Opinion in *Duncan v. Walker* Recognizes the Availability of Equitable Tolling under AEDPA

In *Duncan v. Walker*, 533 U.S. 167, this Court held that a federal habeas corpus petition is not an "application for State post-conviction or other collateral review" within the meaning of 28 U.S.C. § 2244(d)(2), and therefore AEDPA's one-year limitation period is not statutorily tolled during the time a federal petition is pending. Walker had timely filed a *pro se* habeas petition challenging his state robbery conviction, but the petition was dismissed without prejudice because it was not apparent that Walker had exhausted state remedies. 533 U.S. at 169-70. By the time Walker refiled a federal petition, the one-year limitation period had expired. *Id.* at 170. The district court dismissed the petition as time barred, but the Second Circuit reinstated it on the theory that the limitation period was tolled during the time the initial federal petition was pending (about three months). *Id.* at 170-71.

In reversing the Second Circuit, the *Duncan* majority stated that it had no occasion to address the question of the availability of equitable tolling in light of the facts (1) that Walker had more than nine months remaining in the limitation period when the district court dismissed his initial petition without prejudice; and (2) that Walker never returned to state court, but instead filed another federal petition about 10 months later, asserting claims

[4] AEDPA also contains a 180-day limitation period that is not applicable here, 28 U.S.C. § 2263(a). That provision applies solely to habeas corpus petitions filed by capital prisoners in the custody of states that have implemented special qualifying provisions relating to the appointment, compensation, and standards of competency of state postconviction counsel. 28 U.S.C. §§ 2261-2266 (Chapter 154 of 28 U.S.C.); *Calderon v. Ashmus*, 523 U.S. 740, 742-43 (1998).

different from those presented in his initial filing. 533 U.S. at 170, 181.

In an opinion concurring in part and concurring in the judgment, Justice Stevens, joined by Justice Souter, made "two observations regarding the equitable powers of the federal courts" to avoid the harsh consequences of the one-year limitation period and preserve federal review, powers that remain unaffected by the majority's "limited holding." 533 U.S. at 182-84. First, Justice Stevens encouraged district courts confronted with mixed petitions to retain jurisdiction and stay the federal habeas action pending the exhaustion of state remedies. *Id.* at 182-83.

Second, Justice Stevens emphasized that federal courts may equitably toll the limitation period in appropriate cases. 533 U.S. at 183. "[N]either the Court's narrow holding, nor anything in the text or legislative history of AEDPA, precludes a federal court from deeming the limitations period tolled" during the time a mixed petition is pending "as a matter of equity." *Id.* After *Duncan*, "a federal court might very well conclude that tolling is appropriate based on the reasonable belief that Congress could not have intended to bar federal habeas review for petitioners who invoke the court's jurisdiction within the 1-year interval prescribed by AEDPA." *Id.* Moreover, "federal courts may well conclude that Congress simply overlooked the class of petitioners whose timely filed habeas petitions remain pending in district court past the limitations period, only to be dismissed after the court belatedly realizes that one or more claims have not been exhausted." *Id.* at 183-84 (footnote omitted). In such cases, equitable tolling during the pendency of unexhausted federal petitions may be appropriate and is not precluded by the majority's limited holding. *Id.* at 184 & n.3.

Justice Stevens and Justice Breyer (in his separate dissent, joined by Justice Ginsburg) noted a study showing that district courts on average take 268 days to dismiss petitions on procedural grounds, leaving petitioners with little, if any, time to exhaust state remedies and refile a federal petition. 533 U.S. at 184 (Stevens, J.,

concurring); *id.* at 186 (Breyer, J., dissenting). Justice Breyer noted that 93% of habeas petitioners represent themselves *pro se*. 533 U.S. at 191. Justice Stevens explained that "[t]he question whether a claim has been exhausted can often be a difficult one, not just for prisoners unschooled in the immense complexities of federal habeas corpus law . . . but also for district courts." *Id.* at 184 n.2; *see also id.* at 191 (Breyer, J., dissenting).

D. As Ten Circuit Courts of Appeals Have Concluded, AEDPA's One-Year Limitation Period Is Subject to Equitable Tolling

Ten Circuit Courts of Appeals have held that equitable tolling is available in cases challenging state court judgments under AEDPA. *Burger v. Scott*, 317 F.3d 1133, 1141 (10th Cir. 2003); *Griffin v. Rogers*, 308 F.3d 647, 651-52 (6th Cir. 2002); *Wilson v. Battles*, 302 F.3d 745, 748 (7th Cir. 2002), *cert. denied*, 538 U.S. 951 (2003); *Flanders v. Graves*, 299 F.3d 974, 976 (8th Cir. 2002), *cert. denied*, 537 U.S. 1236 (2003); *Drew v. Department of Corrections*, 297 F.3d 1278, 1286 (11th Cir. 2002), *cert. denied sub nom. Drew v. Crosby*, 537 U.S. 1237 (2003); *Warren v. Garvin*, 219 F.3d 111, 113 (2d Cir. 2000); *Harris v. Hutchinson*, 209 F.3d 325, 328-30 (4th Cir. 2000); *Davis v. Johnson*, 158 F.3d 806, 811 (5th Cir. 1998); *Miller,* 145 F.3d at 617-19 (3d Cir. 1998); *Calderon v. United States District Court (Beeler)*, 128 F.3d 1283, 1288-89 (9th Cir. 1997); *see also Dunlap v. United States*, 250 F.3d 1001, 1004 n.1 (6th Cir. 2001) ("Every circuit that has decided this issue has held that the one-year limitation period under § 2255 (or § 2244) is a statute of limitations, subject to the doctrine of equitable tolling, rather than a jurisdictional requirement").

The First Circuit has at different times assumed that equitable tolling is available or stated that it has not resolved the issue, and it has remanded cases to district court to consider equitable tolling claims. *David v. Hall*, 318 F.3d 343, 346 (1st Cir.), *cert. denied*, 124 S. Ct. 66 (2003); *Neverson v. Bissonnette*, 261 F.3d 120, 127 (1st Cir. 2001).

The consensus in the lower courts that AEDPA's one-year limitation provision is subject to equitable tolling is consistent with this Court's decisions, and the language, structure, purpose and legislative history of AEDPA.

1. Limitations Periods in Federal Statutes Are Presumptively Subject to Equitable Tolling, and This Court Has Found Equitable Tolling Available in Numerous Contexts

This Court has repeatedly affirmed its "understanding that federal statutes of limitations are generally subject to equitable principles of tolling." *Rotella v. Wood*, 528 U.S. 549, 561 (2000); *Young v. United States*, 535 U.S. 43, 49-50 (2002) ("It is hornbook law that limitations periods are 'customarily subject to "equitable tolling"' . . . unless tolling would be 'inconsistent with the text of the relevant statute. . . .' Congress must be presumed to draft limitations periods in light of this background principle.").

The availability of equitable tolling was settled law as long ago as the 1860s. *Braun v. Sauerwein*, 77 U.S. (10 Wall.) 218, 223 (1869); *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 558 (1974) ("In recognizing judicial power to toll statutes of limitation in federal courts we are not breaking new ground."). The presumption in favor of the availability of equitable tolling is so strong that even statutes waiving sovereign immunity are held to incorporate tolling. *Irwin*, 498 U.S. at 95-96 ("the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States").

Applying these principles, this Court has held that the time limits for filing claims in numerous and diverse federal statutes are subject to equitable tolling. *See, e.g.*, *Young*, 535 U.S. 43 (three-year lookback period allowing IRS to collect taxes against debtor is equitably tolled during pendency of debtor's earlier Chapter 13 proceeding); *Zipes*, 455 U.S. at 393 ("filing a timely charge of

discrimination with the EEOC is not a jurisdictional prerequisite to suit in federal court, but a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling") (footnote omitted); *Burnett*, 380 U.S. at 428 ("when a plaintiff begins a timely FELA action in a state court of competent jurisdiction, service of process is made upon the opposing party, and the state court action is later dismissed because of improper venue, the FELA limitation is tolled during the pendency of the state action").

In *Irwin*, this Court summarized its equitable tolling holdings. The Court explained:

> We have allowed equitable tolling in situations where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period, or where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass. We have generally been much less forgiving in receiving late filings where the claimant failed to exercise due diligence in preserving his legal rights.

498 U.S. at 96 (footnotes omitted).

This Court has recognized that equitable tolling is appropriate in other cases, as well, including when the claimant has received inadequate notice; when a motion for appointment of counsel is pending and equity would justify tolling the statutory period until the motion is acted upon; when the court has led the plaintiff to believe that she had done everything required of her; or when affirmative misconduct on the part of a defendant lulled the plaintiff into inaction. *Baldwin County Welcome Center v. Brown*, 466 U.S. 147, 151 (1984) (per curiam); *Young*, 535 U.S. at 50.

2. Equitable Tolling Is Consistent with AEDPA's Language, Structure, Purpose and Legislative History

As Judge Kozinski reasoned in the first Court of Appeals case to consider the issue, "[e]very relevant signal – from the Act's plain language, to its legislative history, to its structure – points in the same direction: [AEDPA's] one-year timing provision is a statute of limitations subject to equitable tolling, not a jurisdictional bar." *Beeler*, 128 F.3d at 1289.

"A plain reading of the language of § 2244 . . . leads to the conclusion that Congress intended that the limitations period be interpreted as a statute of limitations." *Davis*, 158 F.3d at 811. *Beeler* observed that, unlike other parts of AEDPA, the one-year limitation provision in § 2244(d)(1) is "remarkably lucid. It is phrased only as a 'period of limitation,' and 'does not speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts.'" 128 F.3d at 1288 (*quoting Zipes*, 455 U.S. at 394); *Miller*, 145 F.3d at 618 (emphasizing that "§ 2244(d)(1) refers to the one year as a 'period of limitation' and a 'limitation period,' and does not use the term 'jurisdiction'"); *Davis*, 158 F.3d at 811 ("§ 2244(d)(1) states only that 'a 1-year period of limitation shall apply' and does not contain any restrictive language that would imply a limit on federal court jurisdiction").

"This interpretation of § 2244(d)(1) is consistent with a plain reading of AEDPA's placement within the federal habeas statute." *Davis*, 158 F.3d at 811. As the Fifth Circuit has explained:

> When Congress amended the habeas corpus provisions by enacting AEDPA, it took care to separate jurisdiction provisions from this limitations-period provision. The explicit grant of jurisdiction to the district courts relating to the habeas writ is contained in 28 U.S.C. § 2241. Congress

> chose to insert the AEDPA limitation amendment into § 2244, which concerns the finality of determinations and contains provisions relating to non-jurisdictional limitations, such as restraints on duplicative and frivolous litigation. This plain reading of the statute as a whole implies that Congress did not intend by its choice of language and placement to limit federal jurisdiction through adoption of a one-year limitations period for federal habeas claims.

Id.; *Miller*, 145 F.3d at 618 ("the statute affirmatively separates the time limitation provision from the section that deals with jurisdiction," and "the provision in which Congress explicitly grants jurisdiction to the district courts . . . does not reference the timely-filing requirement"); *Beeler*, 128 F.3d at 1288 (similar); *compare Zipes*, 455 U.S. at 393-94 (absence of reference to jurisdiction in Title VII filing requirement provision and absence of reference to timely filing in jurisdiction provision support conclusion that Title VII filing deadline is subject to equitable tolling).

Moreover, as *Beeler* emphasized, this Court has "repeatedly held that timing provisions even more unyieldingly phrased than AEDPA's are statutes of limitations subject to tolling." 128 F.3d at 1288. For example, this Court held that equitable tolling is available where the statute mandated that "'no action shall be maintained . . . unless commenced within three years from the day the cause of action accrued.'" *Burnett*, 380 U.S. at 425; *Beeler*, 128 F.3d at 1288.

That section 2244(d) contains several express tolling provisions does not imply that equitable tolling is precluded. Section 2244(d)(1)(A)-(D) lists various triggering events for the commencement of the limitation period, and § 2244(d)(2) provides that the limitation period is tolled during the time a properly filed application for state post-conviction relief is pending. *See supra* at 7-8. In *Harris*, the Fourth Circuit persuasively rejected the argument that these explicit exceptions to the one-year limitation

period indicate that Congress intended to foreclose any other exceptions. 209 F.3d at 329. The court reasoned that the argument

> reads too much into any negative inference that may reasonably be drawn from the exceptions. The exceptions in § 2244(d)(1)(B)-(D) simply make the writ available to address later arising circumstances, while the exception in § 2244(d)(2) ensures that state post-conviction review will be allowed to proceed on course. Without these exceptions, a petitioner could inappropriately be denied the writ altogether, "risking injury to an important interest in human liberty." *Lonchar v. Thomas*, 517 U.S. 314, 324 [] (1996). The inclusion of these statutory provisions does not give rise to the inference that the application of the limitation period must otherwise be absolute, as might be the case if the period were jurisdictional.

Id.; *Young*, 535 U.S. at 52-53 (holding that three-year lookback provision allowing IRS to collect taxes against debtor was tolled during pendency of Chapter 13 proceeding, and refusing to draw "negative inference" from presence of explicit tolling provision elsewhere in the statute).

To the contrary, as the Third Circuit concluded in *Miller*, the provision of a "fraudulent concealment" exception in § 2244(d)(1)(B) and a "discovery rule" in § 2244(d)(1)(D) shows "'that the drafters envisioned the provision to function as a typical statute of limitations, rather than a jurisdictional limitation.'" 145 F.3d at 618; *Young*, 535 U.S. at 53 (express tolling provision in Bankruptcy Code incorporating traditional equitable principles supplements rather than displaces principles of equitable tolling).

The provision of a 30-day tolling provision in a separate part of AEDPA, 28 U.S.C. § 2263(b)(3), does not alter the conclusion that the one-year provision of § 2244(d) is subject to equitable tolling. Section 2263 is part of Chapter 154 of AEDPA, which applies solely to habeas corpus petitions filed by capital prisoners in the custody of states

(known as "opt-in states") that have implemented special qualifying procedures relating to the provision of state postconviction counsel. *See supra* at 8 n.2. Chapter 154 provides for expedited review in actions brought against opt-in states, and imposes a 180-day limitation period for filing a federal habeas petition in such cases. 28 U.S.C. § 2263(a); *Ashmus*, 523 U.S. at 742. Section 2263(b)(3)(B) states that "[t]he [180-day] time requirements established [for capital cases from opt-in states] shall be tolled . . . during an additional period not to exceed 30 days, if . . . a showing of good cause is made for the failure to file the habeas corpus application within the time period established by this section."

Beeler rejected the argument that the 30-day tolling provision in Chapter 154 cases indicates that equitable tolling is unavailable under the one-year limitation provision in other cases. The court emphasized that "[t]he Supreme Court has cautioned against using this kind of negative inferential reasoning, because such 'excursions into extrapolation of legislative intent' are most often 'entirely unilluminating.'" 128 F.3d at 1289 (*quoting Cort v. Ash*, 422 U.S. 66, 83 n.14 (1975)). The court reasoned that "the more reasonable inference to be drawn from Congress's inclusion of a 30-day tolling limit in [Chapter 154] runs contrary to that proffered by [the argument's proponent]." *Id.* The court noted that "[s]tatutes of limitation are presumptively subject to equitable tolling," citing this Court's decisions. *Id.* The court concluded that the "30-day tolling limit was therefore probably designed to cap what would have otherwise been an unlimited tolling period. Because [§ 2254(d)] contains no similar restriction, we can infer that Congress did not intend to upset the normal default rule allowing longer tolling periods." *Id.*; *Davis*, 158 F.3d at 811 (noting that § 2244(d)'s "limitation period does not establish an absolute outside limit within which suits must be filed").

Beeler also correctly concluded that "AEDPA's legislative history, were it necessary to consult it, speaks with equally resounding clarity" that the one-year provision is a statute of limitation rather than a jurisdictional bar. 128

F.3d at 1288. Neither the conference report, nor any statements of Senators or Representatives, describe the one-year limitation as a restriction on federal court jurisdiction. *Id.*; *Miller*, 145 F.3d at 618.

By contrast, many members of Congress, including AEDPA's authors in the Senate and its sponsors in the House, describe the provision as a "'statute of limitations.'" *Beeler*, 128 F.3d at 1288. For example, before AEDPA was enacted, Senator Hatch stated that under current law, there is no "statute of limitations" on filing habeas petitions. 141 Cong. Rec. S7805 (daily ed. June 7, 1995). In contrast, he explained, the new legislation will "have [a] 1-year statute of limitations." 141 Cong. Rec. S7597 (daily ed. May 26, 1995). Senator Spector stated that he "introduced [the AEDPA] legislation . . . to impose a statute of limitations on the filing of habeas corpus petitions." 142 Cong. Rec. S3472 (daily ed. Apr. 17, 1996). In considering AEDPA, Senator Cohen stated, "I support a statute of limitations for filing habeas petitions." 141 Cong. Rec. S7838 (daily ed. June 7, 1995). Senator Biden added, "I agree with my Republican colleagues from Utah and Pennsylvania that we ought to have a strict statute of limitations. . . ." *Id.* at S7840. And after AEDPA was passed, Representative Hyde stated, "[n]ow, we have a 1-year statute of limitations in habeas." 142 Cong. Rec. H3606 (daily ed. Apr. 18, 1996); *see generally Beeler*, 128 F.3d at 1288; *Miller*, 145 F.3d at 618.

Construing § 2244(d)(1) as a statute of limitations subject to equitable tolling is also consistent with AEDPA's statutory purpose of curbing the abuse of the writ of habeas corpus. *Miller*, 145 F.3d at 618. A one-year statute of limitation "will considerably speed up the habeas process while retaining judicial discretion to equitably toll in extraordinary circumstances." *Id.*; *Beeler*, 128 F.3d at 1288 (construing § 2244(d) as a statute of limitations serves AEDPA's goal of reducing "unacceptable delay" in the federal habeas process "quite well; not as well as a strict jurisdictional bar to be sure, but [the] time-limit will doubtless speed up the habeas process considerably").

The development of the case law since *Beeler* and other cases recognizing equitable tolling under AEDPA confirms the accuracy of *Beeler*'s prediction that "district judges will take seriously Congress's desire to accelerate the federal habeas process, and will only authorize extensions when this high hurdle is surmounted." *Beeler*, 128 F.3d at 1289; *see, e.g.*, *Burger*, 317 F.3d at 1141 ("we have limited equitable tolling of the one-year limitations period to 'rare and exceptional' circumstances"); *Wilson*, 302 F.3d at 748-49 ("'[e]quitable tolling is granted sparingly'"); *compare Irwin*, 498 U.S. at 96 ("[f]ederal courts have typically extended equitable relief only sparingly").

II.

FACTORS GUIDING ANALYSES OF EQUITABLE TOLLING CLAIMS UNDER AEDPA

If the Court is inclined to consider the question whether equitable tolling applies in the case at bar, *amici* respectfully suggest that the Court remand the case for resolution of this highly fact-based question. The Court's order granting certiorari does not include the equitable tolling issue, and a lower court would be in a better position to review the complete record relevant to deciding whether tolling applies.

This approach is supported by *Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 193, 196 (1997). In *Klehr*, the Court declined to "go beyond the writ's question to reexamine the fact-based rule-application issue[s]" of whether the Eighth Circuit had properly determined when plaintiffs should have reasonably discovered their claim and whether they were diligent in pursuing their claim. 521 U.S. at 193-96. The Court had granted certiorari on the legal questions of (1) the date upon which a civil action accrues under the Rackateer Influenced and Corrupt Organization Act ("RICO"); and (2) whether a plaintiff alleging that his late-filed RICO claim was fraudulently concealed, and therefore should be deemed timely, must be reasonably diligent in trying to discover his cause of action. *Id.* at 182, 194. The Court refused to review the Eighth Circuit's "highly fact based" conclusions on the discovery and due diligence questions, emphasizing that "[d]oing so would involve examining an evidentiary record of several thousand pages" and exceed the scope of the writ. *Id.* at 193, 196. In the instant appeal, the Court has not granted certiorari on the equitable tolling issue, and the lower court is in a better position to review the record necessary to decide the issue in the first instance.

If the Court decides the equitable tolling issue in the present appeal, or remands the issue for a decision below, the lower courts may well benefit from the Court's guidance on factors to consider in deciding equitable tolling claims under AEDPA. Of course, by its very nature, "[e]quity eschews mechanical rules" and "depends on flexibility." *Holmberg v. Armbrecht*, 327 U.S. 392, 396 (1946). "As a discretionary doctrine that turns on the facts and circumstances of a particular case, equitable tolling does not lend itself to bright-line rules . . . ." *Fisher v. Johnson*, 174 F.3d 710, 713 (5th Cir. 1999). Nevertheless, the lower courts' equitable tolling cases under AEDPA, and this Court's equitable tolling cases in other contexts, identify several factors that should inform an equitable tolling analysis.

Of the Courts of Appeals to consider equitable tolling under AEDPA, the Sixth Circuit has probably articulated the most detailed and specific test. The Sixth Circuit has "identified five factors to consider when determining the appropriateness of equitably tolling a statute of limitations":

> (1) the habeas petitioner's lack of notice of the filing requirement;
>
> (2) the petitioner's lack of constructive knowledge of the filing requirement;
>
> (3) the petitioner's diligence in pursuing his rights;
>
> (4) the absence of prejudice to the respondent; and

(5) the petitioner's reasonableness in remaining ignorant of the legal requirement for filing his claim.

Dunlap, 250 F.3d at 1008.

The factors identified in the Sixth Circuit's balancing test are consistent with this Court's case law, which recognizes that equitable tolling is appropriate when the claimant has received inadequate notice so long as he has acted with reasonable diligence during the statutory period. *See supra* at 11-12; *Irwin*, 498 U.S. at 96.

The Sixth Circuit test also rightly considers the petitioner's lack of notice and knowledge about filing requirements, and his reasonableness in remaining ignorant of them. Although ignorance of the law may be no excuse in some contexts, it is a valid consideration in determining whether a *pro se* inmate's late-filed habeas petition should be deemed timely, particularly given that AEDPA's one-year limitation period marks such a radical departure from prior habeas law, and that many prisons' law libraries did not make AEDPA available until long after its enactment. *Zarvela v. Artuz*, 254 F.3d 374, 379 (2d Cir. 2001) (in AEDPA, "Congress significantly altered habeas corpus procedure by imposing a one-year statute of limitations and sharply limiting the grounds for second or successive petitions"); *Whalem/Hunt v. Early*, 233 F.3d 1146 (9th Cir. 2000) (en banc) (per curiam) (remanding case to determine propriety of equitable tolling based on prisoner's declaration that prison law library did not have materials describing AEDPA until after one-year period had run in his case). It is also a factor that may vary from case to case.

In *Dunlap*, the Sixth Circuit found the foregoing five-factor test preferable to the "extraordinary circumstances" test applied by the Ninth Circuit in *Beeler* and used by some other Circuits. 250 F.3d at 1008-09. *Beeler* stated that equitable tolling "will only be granted if 'extraordinary circumstances' beyond a prisoner's control make it *impossible* to file a petition on time." 128 F.3d at 1288 (emphasis added). The Sixth Circuit was correct to reject the *Beeler* test, because its draconian mandate that

equitable tolling be denied unless events make it "impossible" to file a timely petition has no basis in AEDPA or this Court's equitable tolling law.

Amici are unaware of any holding by this Court conditioning a grant of equitable tolling on the showing that the timely filing of a claim was "impossible." An impossibility requirement is inconsistent with the cases where the Court has found equitable tolling to be proper, *e.g.*, where the plaintiff actively pursued his judicial remedies by filing a defective pleading during the statutory period; the plaintiff received inadequate notice; or when the court led the plaintiff to believe that she had done everything required of her. In none of those situations was a timely filing "impossible." Rather, tolling was proper because although the plaintiff diligently pursued relief, he did not timely file his claims because of some action or circumstance external to him.

Cases outside the Ninth Circuit have not imposed an impossibility standard. *See, e.g., Warren*, 219 F.3d at 113 ("In the context of a late-filed habeas petition, equitable tolling may sometimes offer an avenue for avoiding Suspension Clause issues in the 'rare case' where strict application of the one year limitations period would create 'an *unreasonable* burden.'") (emphasis in original); *Miller*, 145 F.3d at 618 (Equitable tolling is proper when the "'principles of equity would make the rigid application of a limitation period unfair.' . . . Generally, this will occur when the petitioner has 'in some extraordinary way . . . been prevented from asserting his or her rights.'") (citations omitted). Even the Ninth Circuit has framed AEDPA tolling questions without imposing an impossibility requirement. *See, e.g., Tillema v. Long*, 253 F.3d 494, 504 (9th Cir. 2001) ("'when external forces, rather than a petitioner's lack of diligence, account for the failure to file a timely claim, equitable tolling of the statute may be appropriate'").

Further, an examination of the Ninth Circuit's habeas decisions quoting the impossibility test and permitting equitable tolling reveals that it was not in fact "impossible" for the petitions in some of those cases to have been

timely filed. For example, in *Beeler*, the court-appointed attorneys for a capital petitioner were ordered to file a habeas petition by March 25, 1997, but at some point (unspecified in the opinion), the lead attorney accepted employment out of state and was permitted to withdraw. The second attorney was promoted to lead counsel and another attorney was appointed as second chair. On February 3, 1997, these attorneys asked the district court in advance to equitably toll the statute, which it did, giving them, in effect, an extension until October 13, 1997 to file the petition. The Ninth Circuit affirmed and, although it quoted the "impossib[ility]" language, its holding simply noted that "much of the work product [the departing attorney] left behind was not usable by replacement counsel – a turn of events over which Beeler had no control." 128 F.3d at 1288. Surely, it was not *impossible* for two experienced capital attorneys to file a habeas corpus petition on any date earlier than October 13, 1997.

The impossibility test cited in *Beeler* was first framed by the district court in *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1550 (N.D. Cal. 1987). In *Forti*, the district judge stated that federal courts applied a theory of equitable tolling "similar to an 'impossibility' doctrine," citing two cases: one holding that plaintiff's internment by Japan during World War II tolled the limitation period on his Jones Act claim (*Osbourne v. United States*, 164 F.2d 767 (2d Cir. 1947)); and the other holding that the Civil War tolled the limitation period for a breach of contract claim. (*Hanger v. Abbott*, 73 U.S. (6 Wall.) 532 (1867)). *Id.*

Neither of those cases, however, uses the term "impossible," nor did those courts purport to limit tolling only to circumstances arising out of the cataclysmic upheavals caused by war. In *Forti* itself, where the plaintiffs were seeking damages for injuries sustained during Argentina's "dirty war" of the mid-1970's, the court denied a motion to dismiss on limitations grounds, holding that plaintiffs might be able to prove that they were unable to gain effective access to Argentina courts during the limitations period, and therefore were entitled to tolling. 672 F. Supp.

at 1550. Thus, the court's actual holding belies its framing of the test in terms of "impossibility."

In sum, under this Court's case law, federal courts have the discretion to grant equitable tolling on a case-by-case basis to avoid inequity, whether events have made a timely filing "impossible" or merely unreasonably burdensome. Because equitable tolling is a flexible, discretionary doctrine, it is not possible to catalog all of the scenarios in which tolling is proper, but it is undeniably appropriate where, despite his diligent efforts, a petitioner has been unable to timely file his claims because of extraordinary or external circumstances; he has filed a defective pleading within the statutory period; or he has done everything a court has led him to believe is required of him.

III.

FORD IS ENTITLED TO EQUITABLE TOLLING

Under the foregoing standards, Ford is entitled to equitable tolling, and the Court should so hold if it reaches the issue. Equitable tolling is necessary to vindicate Ford's rights under *Rose v. Lundy*, 455 U.S. 509, and is consistent with this Court's equitable tolling jurisprudence, Justice Stevens' concurring opinion in *Duncan*, and AEDPA tolling cases in the Courts of Appeals.

In *Rose*, this Court held that district courts must dismiss mixed petitions but also must "leav[e] the prisoner with the choice of returning to state court to exhaust his claims or of amending or resubmitting the habeas petition to present only exhausted claims to the district court." 455 U.S. at 510; *Slack*, 529 U.S. at 486 ("*Rose v. Lundy* held that a federal district court must dismiss habeas corpus petitions containing both exhausted and unexhausted claims. The opinion, however, *contemplated that the prisoner could return to federal court after the requisite exhaustion.*") (emphasis added).

When *Rose* was decided, there was no statute of limitations in habeas cases. As the Ninth Circuit has explained:

> Prior to the advent of AEDPA, dismissal without prejudice to the filing of a new, exhausted petition caused no detriment to the petitioner, because there was no time limitation on the filing of a federal habeas petition. AEDPA's one-year statute of limitations, however, has rendered outright dismissal perilous to some litigants, because petitioners . . . may find themselves time-barred when they attempt to resubmit their exhausted claims to the district court.

Anthony v. Cambra, 236 F.3d 568, 573 (9th Cir. 2000); *Zarvela*, 254 F.3d at 377 (*Rose*'s "direction was given before Congress significantly altered habeas corpus procedure by imposing a one-year statute of limitations and sharply limiting the grounds for second or successive petitions"); *Nowaczyk v. Warden, New Hampshire State Prison*, 299 F.3d 69, 79 (1st Cir. 2002) ("When *Rose* was decided, there was no time limit on petitions filed under § 2254. Thus, there was little cost to a dismissal without prejudice – the state prisoner could refile the petition at any time following exhaustion of his federal claims. AEDPA changed matters.").

In the case at bar, Ford diligently filed his initial petitions within AEDPA's one-year limitation period, as applied to petitioners whose convictions became final before AEDPA was enacted (i.e., by April 24, 1997, one year after AEDPA became law). Although the one-year statute applied, the district court suggested that dismissing the petitions was inconsequential, stating in its dismissal orders that dismissal "was without prejudice to refiling after exhaustion of the unexhausted grounds. . . ." However, because the statute of limitations had expired while Ford's first petitions were pending – over four months before the dismissal orders were issued – it was impossible for Ford to refile a timely federal petition after exhausting state remedies.

The district court never advised Ford of AEDPA's one-year limitation period or how the period applied to his petitions. *See Castro v. United States*, 124 S. Ct. 786, 792-93 (2003) (to enable *pro se* inmates to make informed

judgments about how to litigate their claims under AEDPA, a district court cannot recharacterize a federal inmate's motion as a 28 U.S.C. § 2255 motion unless it informs the inmate of its intent to recharacterize, warns that the recharacterization will subject subsequent § 2255 motions to the law's "second or successive" restrictions, and provides an opportunity to withdraw or amend the filing).

Nor did the court inform Ford that if he dismissed his unexhausted claims and renewed his stay requests, the court could stay his petitions pending the exhaustion of state remedies. *Kelly v. Small*, 315 F.3d 1063, 1070 (9th Cir.) ("the district court must consider the alternative of staying the petition after dismissal of unexhausted claims, in order to permit [p]etitioner to exhaust those claims and then add them by amendment to his stayed federal petition"; "we join the 'growing consensus' in recognizing the clear appropriateness of a stay when valid claims would otherwise be forfeited"), *cert. denied*, 123 S. Ct. 2094 (2003); *Zarvela*, 254 F.3d at 380 (a stay "will be the only appropriate course" where outright dismissal could jeopardize the timeliness of any subsequent petition); *Delaney v. Matesanz*, 264 F.3d 7, 14, n.5 (1st Cir. 2001) (recommending stays "in instances in which the original habeas petition, though unexhausted, is timely filed, but there is a realistic danger that a second petition, filed after exhaustion has occurred, will be untimely").

The court misled Ford by informing him that if he opted to dismiss the first petitions to exhaust claims in state court, the dismissals would be "without prejudice." *Tillema*, 253 F.3d at 503-04 (because limitations period expired before court dismissed petition for failure to exhaust, "the district court's erroneous dismissal . . . literally and immediately extinguished [petitioner's] right to federal habeas review . . . [and] it cannot accurately be said that the dismissal of [the] petition was, as the court's order stated, 'without prejudice' ").

The court's misleading statements, and its failure to advise Ford of AEDPA's statute of limitations and his right

to seek a stay of fully exhausted petitions, deprived Ford of a meaningful opportunity to exercise his rights under *Rose*. Equitable tolling is necessary to preserve Ford's right under *Rose* to "return to federal court after the requisite exhaustion" and obtain, for the first time, federal court review of the merits of his habeas claims. *Lonchar*, 517 U.S. at 330 ("the interest in permitting federal habeas review of a first petition is quite strong"); *Slack*, 529 U.S. at 487 ("A petition filed after a mixed petition has been dismissed under *Rose v. Lundy* before the district court adjudicated any claims is to be treated as 'any other first petition' and is not a second or successive petition."); *Tillema*, 253 F.3d at 504 ("[H]ad the district court followed the law, *i.e.*, *Rose v. Lundy*, Tillema would have been permitted to proceed with all but one of his claims; because the district court erred, Tillema lost all opportunity for federal review of all of his claims. We therefore hold that Tillema is 'entitled to the benefit of the equitable tolling of the statute of limitations.'") (footnote and citation omitted).

Granting Ford equitable tolling is also consistent with Justice Stevens' concurring opinion in *Duncan*. Ford "invoke[d] the [federal] court's jurisdiction within the 1-year interval prescribed by AEDPA." 533 U.S. at 183. Unlike the habeas petitioner in *Duncan*, but consistent with the scenario presented in Justice Stevens' concurrence, AEDPA's limitation period expired while Ford's first petitions were pending and before the court granted the State's motions to dismiss for failure to exhaust. Also unlike the habeas petitioner in *Duncan*, after his first petitions were dismissed Ford promptly filed petitions in state court to exhaust claims, and then quickly refiled federal petitions after his state petitions were denied.

On similar facts, the Tenth Circuit granted equitable tolling in *York v. Galetka*, 314 F.3d 522 (10th Cir. 2003). The court explained that "York's timeliness problem is that the one-year limitations period was not tolled during the time his second federal habeas petition was pending." *Id.* at 527. The district court dismissed the second petition for failure to exhaust state remedies, and when York returned

to federal court to refile a petition after exhaustion, the petition was dismissed as time barred. *Id.* at 524-26. The Tenth Circuit noted that:

> [i]n *Duncan* . . . the very case that created the 'no tolling' rule for prior federal habeas petitions, concurring justices of the Supreme Court recognized that the rule might pose problems for petitioners, like York, whose prior petitions had been dismissed in order to exhaust state remedies. . . . These justices suggested that a federal court might apply equitable tolling to relieve a petitioner of the consequences of the rule.

Id. at 527 (citations omitted). The court concluded that the district court should have applied equitable tolling to render York's third petition timely, and remanded the case for consideration of the merits of the petition. *Id.* at 528.

The case at bar is an even stronger case for tolling than *York*, because when York's second petition was dismissed for failure to exhaust, he still had 11 days remaining in the limitations period to try to exhaust his claims and return to federal court. 314 F.3d at 526. Here, by contrast, the statute had expired four months before the court dismissed Ford's petitions, making it impossible for him to timely refile.

Equitable tolling is also required under this Court's equitable tolling jurisprudence, which authorizes tolling "where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period." *Irwin*, 498 U.S. at 96 (describing holding in *Burnett*, 380 U.S. 424). In *Burnett*, a railroad employee asserting a claim under the Federal Employers' Liability Act ("FELA") filed suit in state court (which had concurrent jurisdiction) within FELA's limitation period. 380 U.S. at 424-25. Promptly after the state action was dismissed for improper venue, but after FELA's limitation period had expired, the employee filed suit in federal court. *Id.* at 425. The district court dismissed the case as time barred. *Id.* In reversing the dismissal, and finding the claim timely under equitable tolling principles, the Court reasoned that the claimant:

> did not sleep on his rights but brought an action within the statutory period in the state court of competent jurisdiction. . . . [He] failed to file a [] FELA action in the federal courts, not because he was disinterested, but solely because he felt that his state action was sufficient. Respondent could not have relied upon the policy of repose embodied in the limitation statute, for it was aware that petitioner was actively pursuing his FELA remedy; in fact, respondent appeared specially in the Ohio court to file a motion for dismissal on grounds of improper venue.

Id. at 429-30.

Similarly, Ford did not sleep on his rights, but filed defective (mixed) habeas petitions in a court of competent jurisdiction within the limitation period. The State successfully moved to dismiss the petitions as unexhausted and then – after Ford followed the court's orders, exhausted state remedies and returned to federal court – moved to dismiss the second petitions as time barred. The State was not prejudiced by the late filing, because it was aware of Ford's prior, timely efforts to vindicate his federal habeas rights.

This Court's recognition that equitable tolling is proper when a court has led the plaintiff to believe that he has done everything required of him also compels tolling in the case at bar. *Baldwin County Welcome Center*, 466 U.S. at 151. Unaware of the effect of AEDPA's limitation period, Ford followed an option provided by the court, promptly presented his unexhausted claims to state court, and quickly returned to federal court after his state petitions were dismissed, only to have his second petitions dismissed as untimely.

Equitable tolling is also warranted under another line of cases holding that a party's reliance on a court order or on the statements or conduct of a judge justifies tolling. This principle is so firmly established that this Court has held that such reliance justifies extensions of jurisdictional bars, such as the time to file a notice of appeal. *Thompson*

v. I.N.S., 375 U.S. 384 (1964) (per curiam) (late-filed notice of appeal deemed timely when date selected for filing notice was made in reliance on district court's incorrect statement that new trial motion was filed "in ample time"); *Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.*, 371 U.S. 215 (1962) (per curiam) (late-filed notice of appeal deemed timely when time for filing notice was based on district court's order, later reversed by court of appeal, that deadline was extended because of excusable neglect).

The misleading orders given to Ford are particularly egregious in light of the duty of the courts "to take appropriate measures to permit the adjudication of *pro se* claims on the merits, rather than to order their dismissal on technical grounds." *Donald v. Cook Co. Sheriff's Dep't*, 95 F.3d 548, 555 (7th Cir. 1996); *Castro*, 124 S. Ct. 786 (requiring advisements to *pro se* litigants in § 2255 cases).

The propriety of granting equitable tolling under AEDPA when courts misled *pro se* petitioners is illustrated by *United States v. Patterson*, 211 F.3d 927 (5th Cir. 2000). In *Patterson*, a *pro se* prisoner timely filed a motion challenging his federal conviction under 28 U.S.C. § 2255. 211 F.3d at 928. He moved to voluntarily withdraw the motion without prejudice "'so that he could find an experienced writ-writer'" and refile his motion at "'a later date.'" *Id.* The district court granted the request and dismissed the § 2255 motion without prejudice.

When Patterson refiled his § 2255 motion nearly a year later, it was dismissed as untimely. 211 F.3d at 930. The Fifth Circuit granted equitable tolling to render the late-filed motion timely. The court explained, in reasoning applicable here:

> At the time Patterson moved to dismiss his petition, he and the district court apparently were under the mistaken impression that he would not be time-barred from filing another § 2255 motion. . . . [P]atterson relied to his detriment on the district court's granting of his request to dismiss the initial, timely filed § 2255 motion in order to refile it at a later date. The declared

> reason for Patterson's request to withdraw the initial § 2255 motion was to file another (with the assistance of a writ-writer) at a later date. However, on the very date that the district court dismissed Patterson's initial § 2255 motion (over the government's objections), April 30, 1997, any future filings would have been time-barred . . . .
>
> We are persuaded that these circumstances are sufficiently rare and extraordinary to warrant equitable tolling . . . .

Id. at 931-32.

CONCLUSION

The judgment in the Court of Appeals should be affirmed. *Amici* request that if the Court reaches the equitable tolling issue, it hold that Ford is entitled to tolling; and that if the Court announces standards to apply to equitable tolling claims under AEDPA, it set forth standards consistent with those recommended herein.

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